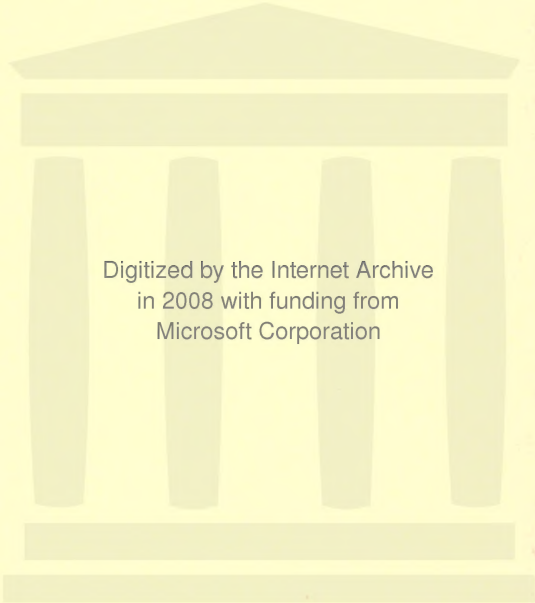

HUSBAND AND WIFE IN THE LAW

BY THE SAME AUTHOR

HISTORY OF POLITICS

(IN TEMPLE PRIMER SERIES)

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HUSBAND & WIFE
IN THE LAW

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PREFACE

THIS is a book written for the general public; not, primarily, for lawyers. Consequently, it is not furnished with that formidable apparatus of footnotes and references which is a proper appendage of a book written for lawyers. But, in case any of its readers should desire to know more of the subject, a short list of larger text-books is given. Those books will be found to contain the usual references to authorities.

It is, perhaps, hardly necessary to mention that, though he has, for the reasons above stated, omitted to give specific references to the authorities, the writer of this book has not omitted to consult them.

Another caution may not be out of place. This book states facts, not opinions; and the author must not be taken as expressing approval of the rules of law which he describes. On the contrary, he has, though this is not a work of criticism, been unable to refrain from calling attention to one or two of the most glaring anomalies in the existing law.

The truth is, that, until fifty years ago, the law of husband and wife in England was based upon assumptions and social habits which have, during the last fifty years, almost disappeared. Very naturally, great changes have been made in the law during that period. But these changes have been hasty and unsystematic; with the natural result, that the present law on the subject may not unfairly be described, in the language of our ancestors, as an "ungodly jumble." The old system was logical; though, to our ideas, unjust. The new system is not only illogical, but, in many ways, still unjust. And one of the reasons why it is not properly amended is, that so few, of the millions whom it affects, know what it is.

Perhaps the last fact is the best justification for the appearance of this book.

July, 1909.

KEY OF WORK

HUSBAND AND WIFE IN THE LAW

CHAPTER I

PRELIMINARIES OF MARRIAGE

ONE of the most delightful of the minor characters in that altogether delightful work of fiction, *Lorna Doone,* was in the habit of commencing all important discussions with the impressive direction: "Zettle the pralimbinaries." And though this is not intended to be a work of fiction, and though, at least on one recorded occasion, the maxim of the worthy Farmer Snowe did not meet with the most friendly of receptions, we shall do well to follow his advice, and "zettle the pralimbinaries."

For, in spite of certain scandalous stories which are from time to time told of those localities much frequented by their country's bold defenders, where, it is alleged, the too-confiding Jack and Thomas are sometimes pushed or pulled through the marriage ceremony with very little idea of its significance, it is true to say that, at least in legal view, every marriage, to be valid, must be pre-

ceded by a valid, though not equally valid, contract to marry, or, as it is more frequently styled, "engagement," between the same parties. This contract may assume any form that the tastes of the parties may direct; and, if we are to believe the writers of romantic fiction, infinite ingenuity has been expended in devising new forms for it. A look, a murmur, a photograph, even a blush, albeit not, perhaps, in themselves sufficient, may be important links in the chain of proof; though, as we shall shortly see, they may require confirmation by other evidence. Subject to the last requirement, any conduct of the parties themselves from which their mutual intention to marry may fairly be gathered, will be good evidence of a contract to marry. Conduct which evinces any other intention (however reprehensible, in the absence of marriage, that intention may be) is not proof of a contract to marry; nay, it may be the very evidence which decisively disproves the existence of such a contract.

But before going on to state the consequences of a contract to marry, at the present day, it may be well, as explaining future difficulties, to point out that, until comparatively recently, the contract to marry had a far more binding character than it has now. Until the issue of the decrees of the Council of Trent in 1563, it seems to have been the general law of Europe, in spite of the great influence of the Church during the Middle Ages, that no formal ceremony, secular or ecclesiastical, was necessary to the making of a valid marriage.

If the parties agreed to marry *per verba de præsenti* —*i. e.* declared themselves to be actually man and wife, or if they agreed to marry at some future time (*per verba de futuro*) and subsequently cohabited as man and wife, most, though not all, of the legal consequences of marriage followed. No doubt the Church, or either of the parties, for the prevention of scandal and to furnish the Church with her just dues, could compel the celebration of the marriage in due form (*in facie ecclesiæ*); no doubt such luxuries as dower[1] were withheld from a wife whose sense of delicacy could permit her to be content with a huddled-up marriage. Still, such a "pre-contract," as it was called, was a legally binding marriage, and, as such, sufficient to invalidate any marriage subsequently entered into by either of the parties to it in the lifetime of the other; at least unless it had been, in the meanwhile, formally dissolved. This particular consequence, of rendering a subsequent formal marriage invalid, was, however, so far as England was concerned, abolished at the time of the Reformation, by a statute of the year 1540.[2]

The decrees of the Council of Trent put an end to what would seem to us to be the unpardonable laxity of the Middle Ages in the matter of marriage

[1] *i. e.* the provision for his widow made by the law in respect of the owner of land. (As to this, see Chapter III, pp. 44–5.)

[2] There seems to be some ground for saying that this enactment was repealed by a subsequent statute of the year 1548, which certainly revived the jurisdiction of the Church Courts to compel the formal celebration of an informal marriage.

ceremonies; and practically made a religious ceremony imperative for Catholic countries. But as decrees of the Catholic Church were, after the Reformation, no longer obeyed by Protestant countries, this particular enactment had no legal force in Great Britain; and it was not until the year 1753 that, in consequence of certain grave scandals, the celebrated statute known as "Lord Hardwicke's Act" first attempted to make a formal ceremony essential for the celebration of a marriage. And even Lord Hardwicke's Act, as well as the Marriage Act of 1823, which, as we shall see, superseded it, still left open the great question whether a merely informal (as distinct from an irregular) marriage was altogether invalid; these statutes appearing to be aimed rather against marriages celebrated by unlicensed or irregular practitioners, such as Fleet parsons and the like, than against purely secular contracts. Moreover, Lord Hardwicke's Act, and the Act of 1823, had no effect in Scotland; as was proved by the popularity of the so-called "Gretna Green" marriages,[1] which lasted until that particular method of evading the English law was abolished by statute in 1856. In Scotland itself, the old rule still holds good, and is the basis of the informal marriage by "habit and repute," which still occasionally figures in the annals of the Courts. In some (perhaps many) of the States of America, informal marriages are also valid to this day.

[1] Of course the ceremony performed by the blacksmith, though soothing to the consciences of the parties, had no legal validity; except so far as it might be evidence of the informal contract between them.

Lord Hardwicke's Act of 1753, however, had one very definite effect upon what we have called the "preliminaries" of a marriage. It abolished the power to compel the parties to a merely informal contract to celebrate a formal marriage; even where no subsequent marriage had intervened. And thus, by a side wind, it fanned into activity that picturesque and popular, though by no means entirely creditable branch of modern litigation, the "action for breach of promise."[1] For, now that the recalcitrant party could no longer be cited before the ecclesiastical courts, which, until a hundred years after the passing of Lord Hardwicke's Act, exercised jurisdiction in marriage cases, the common law courts, unwilling to leave the injured party entirely without redress, allowed him or her to bring an action for damages against the recreant.

Since 1753, then, the contract to marry, or "engagement," has been an ordinary secular contract. As was hinted above, it is not, even when it is valid, always quite so valid as a marriage; for the singular reason that the law recognizes a marriage (if duly celebrated) as binding on a person at an earlier age than a mere "engagement." Thus, a girl of twelve, and a boy of fourteen years, are capable of being validly married; but they are not capable of making a completely valid contract to marry. For a contract to marry made by an

[1] The name shows how largely this particular action bulks in the public eye. Every action on a contract is, in strictness, for "breach of promise." But the phrase is confined to this particular action.

infant is "voidable," *i. e.* it cannot be enforced against him or her, even on attaining the age of twenty-one; and no subsequent ratification will render such a contract binding on his or her side. On the other hand, an infant may sue an adult on a contract to marry; for the common law, in giving its remedy in damages, does not require reciprocity, as equity does in giving its remedy of "specific performance."

As was said above, no special forms are required for the expression of a contract to marry, or engagement. Yet there is a most important rule of evidence to the effect that, in an action for "breach of promise," the unsupported oath of the plaintiff will not be sufficient to entitle her (or him) to a verdict. And, inasmuch as "engaged" persons do not, as a rule, call in third parties to witness their transports, it is on this account that the correspondence of the period usually plays such a large part in a trial for "breach." But the evidence of third parties is equally valid; and many a man has learnt for the first time, on such an occasion, the meaning which may be attributed, by lynx-eyed neighbours, to his most trivial acts. Mr. Pickwick is not the first or the last instance of this truth; he is merely the most distinguished.

In other respects, the action for breach of promise is treated by the Courts, at least in theory, as an ordinary action of contract. Thus, in theory (though, where a female plaintiff is what the newspapers call "prepossessing," the jury are apt to disregard the warnings of the judge), the damages

are confined to the actual pecuniary loss suffered by the plaintiff. In theory, too, the action may be brought either by the gentleman or the lady; but a male plaintiff in such an action is apt to meet with little consideration. For, in the class of society from which the jury are drawn, it is the correct thing to assume that no consideration of pecuniary advantage ever influences a prospective bridegroom; and the action for breach, if brought by a man, severely outrages this respectable convention. Finally, though an "engagement" implies the contract of persons able and willing to celebrate lawful matrimony, yet, if one party enter into it in the *bonâ fide* belief of the ability of the other, who is wilfully concealing a fact which renders such a marriage impossible (for example, the existence of another wife or husband), the innocent party, on discovering the facts, may obtain damages from the deceiver. If, however, the plaintiff was aware of the impediment, then she (or he) cannot succeed in the action; even though she (or he) pleads that the promise was to marry after the disappearance of the impediment, and that the impediment has, in fact, disappeared. For the law looks upon such prospective arrangements as immoral, and will not encourage them. If both parties were ignorant of the impediment, the same result would probably follow; but the point does not seem to have been actually decided.

A pleasing accompaniment of the engaged state is the exchange between the parties of gifts of greater or less value; and, towards its close, usually

occurs the almost equally pleasing experience of the rain of gifts from their friends. Despite their sentimental associations, these gifts may, and sometimes do, become the subject of differences of opinion; and their legal position is not entirely free from doubt.

The personal presents of small value so frequently passing between an engaged pair, would probably be treated in all cases as out-and-out gifts, irreclaimable under any circumstances. In the old days, when the chattels of a wife passed (in the absence of special provision) to her husband on her marriage, the question could only arise in the event of a rupture of the engagement; and it would have been hard to contend seriously that a necktie given to the gentleman, or a box of gloves offered to the lady, were gifts made on condition of return in the event of the engagement being broken off.

But gifts of greater value are not quite in the same position. They may be "plenishings," or instalments of the furniture for the intended matrimonial nest. Or they may be articles of jewellery or other ornament given by the gentleman to the lady to be worn or used by her as his wife. Gifts of both these classes, by whichever party given, could, undoubtedly, be reclaimed on the rupture of the engagement; perhaps even by a party who unjustifiably broke off the engagement, though, in this case, they would probably be set against the damages which he was liable to pay. The engagement ring is a critical instance; and would probably follow this rule.

In the happier event of the celebration of the marriage, the case of the first class of gifts (*i. e.* the "plenishings" furnished by the parties) has been rendered difficult by the change in the law made by the Married Women's Property Act of 1882, about which there will be a good deal to say later on. That Act has completely destroyed the unity as to property which formerly existed between husband and wife, and has made the wife capable of holding separate property without special precautions. It would probably, therefore, be the view of the Courts, that the "plenishings" contributed by either party remained his or her property; subject, possibly, to the restriction that, as they were given for the purpose of furnishing the matrimonial home, they could not be removed by either party against the will of the other, so long as that home was, in fact, maintained. The articles of jewellery and ornament given by a husband (or prospective husband) to his actual or prospective wife, to be worn or used when presiding over his household, are known as her *paraphernalia*. They are subject to the husband's disposal during his life; and are liable (but only in the last resort) to satisfy his debts after his decease. But he cannot, by his will, leave them away from her. These *paraphernalia* must be carefully distinguished both from those of the husband's chattels which the wife is simply allowed to use—*e. g.* family jewels and heirlooms, of which she has merely the custody, and also from those personal gifts spoken of above, which were, in fact, given to her uncondition-

ally and absolutely. These last, of course, whatever their value, now remain the separate property of the wife, even after the marriage; and are not in any way subject to the husband or his creditors.

With regard to the gifts contributed by friends, there are also some difficulties. Clearly they are made in contemplation of marriage, not of disagreement; and therefore they could probably be reclaimed in the event of the engagement being broken off. As a matter of fact, they are usually returned by the recipients in such a case. Again, in the event of everything going smoothly, little difficulty can arise; so long as the gifts occupy their clearly destined place in the matrimonial home. It is only in the event of separation of husband and wife, whether by death, divorce, judicial separation, or mere voluntary parting, that the question of ownership becomes acute. In such an event, the intentions of the donors at the time when the gifts were made must decide the ownership of the gifts. Such of them as were intended for the husband will be retained by him; those intended for the wife, by her. Gifts made to them jointly will belong to them jointly; and, unless they can agree to a division, must be sold and the proceeds divided. The chief difficulty in applying these rules is one of fact. What was, in fact, the intention of the donor, in each case, at the time of the gift? For it must be understood that the subsequent wishes of the donor can have no legal

effect.[1] Such documents as the letters accompanying the gifts, or the cards affixed to them, will be useful evidence, if preserved. Doubtless, also, the relationship of the donors to the claimants would be taken into account. Presumably the gift of a near relative or intimate friend of the bride, more especially if he or she were an entire stranger to the bridegroom at the time of the engagement, would be held (in the absence of special evidence) to be intended for the lady's ownership.

We do not here speak of those "settlements" of more substantial property which are frequently made in view of the marriages of the wealthier members of the community. These will be dealt with in another chapter.[2] Here we have spoken only of gifts of personal chattels, intended to be at the free disposal of the recipients; and with an account of these may fitly end our discussion of the preliminaries of marriage.

[1] A case actually came before the Courts a few years ago, in which a man who had made a gift of property professed to alter the terms of the gift by a subsequent deed. Such cases do not add to the reputation of the legal advisers of the parties.

[2] Chapter V, pp. 65–7.

CHAPTER II

THE CELEBRATION OF MARRIAGE

HERE again there might appear, at first sight, something in the nature of sacrilege in mingling the dry tones of the law with the peal of marriage bells and the rustle of wedding garments. But, inasmuch as the lawful celebration of marriage is, in most cases, even more important for the ultimate happiness and welfare of the parties than the more festive accompaniments of the occasion, no apology for the intrusion is really needed.

The requirements of a validly celebrated marriage fall under two heads. First come those essentials which must exist in all cases alike, those without which no lawful marriage can be celebrated. Afterwards we may discuss those forms or ceremonies, some of which are now also essential to the validity of a marriage, but with regard to the choice of which much latitude is allowed by the law.

Under the first head will come (1) the *primâ facie* capacity of both parties to enter into a valid marriage; (2) the absence of special disqualifications; (3) the free and intelligent consent of both, and sometimes of other persons, to the marriage.

Thus, no male person under the age of fourteen, and no female under the age of twelve, can enter into

a binding marriage; though it is said that the marriage of a person under these ages, and above the age of seven, remains good unless either party, on attaining the proper age, dissents from it. Whatever the value of this last opinion, the law of England cannot be said to err on the side of strictness in the matter of marriageable age. In fact, the rules on this point have been adopted from Roman law, with very little consideration of the truth that what may be very suitable for the climate and temperament of Italy may be absurd in English conditions.[1] As we shall see, however, the necessity for the consent of the parent or guardian affords some protection against foolish marriages on the part of young persons.

The marriage of a lunatic, also, is absolutely void, even though the other party was unaware of the lunacy. Unfortunately, the degree of lunacy which will induce an English Court to regard a marriage as void seems to depend rather upon a tenderness for the lunatic himself than upon more public considerations. For it would appear that if the alleged lunatic was fully aware of the nature of the marriage relationship and its consequences, and had no delusions on that subject, then, however diseased his or her mind in other respects, no regard for the disastrous consequences which may arise from the union will prevent the marriage being legal and indissoluble. Nor will any

[1] Happily, *illicit* connection with a girl under the age of sixteen is a criminal offence; even though she consent. But this rule does not apply to husbands and wives.

physical infirmity or deformity, however likely to be transmitted to posterity, justify any one in prohibiting a marriage, or induce any Court to declare a marriage void, except the only physical infirmity which cannot, in fact, be transmitted, viz. the incapacity to procreate or conceive children. The science of eugenics has, as yet, made no practical impression on English law; and, with the limited exception for lunacy and incapacity above explained, every male person above the age of fourteen, and every female above the age of twelve, is deemed *primâ facie* capable of celebrating lawful matrimony.

There are, however, three special impediments which may interpose a bar to the marriage of a person *primâ facie* competent to marry. One obvious impediment is, of course, the existence of a previous undissolved marriage to which he or she was a party. The most common cause of the dissolution of a previous marriage is still, in this country, death; but the dissolution may have been due to a decree of divorce or nullity. In this case, however, it must be remembered that the parties are not free to marry again until the decree has been made "absolute"—*i. e.* until, not less than six months after the pronouncing of the first decree, the Court which pronounced it has, at the request of the petitioner, confirmed it. A so-called previous marriage which was, in fact, no marriage at all, will not render a subsequent marriage void; and a special provision relieves from the penalties of bigamy a person who has not heard of her or his husband or wife for a period of seven years, and

who *bonâ fide* believes him or her to be dead. But it will be noticed, with regard to the first case, that it will be incumbent on the party denying the validity of an apparently valid marriage to prove, not merely that it could have been set aside, but, either that it has been so set aside or else that it was absolutely void from the beginning; and, with regard to the second, that if the first husband or wife turns out to have been really alive when the second marriage took place, the second marriage will be absolutely void, and the children, if any, illegitimate, though the offending party may escape the penalties of bigamy.

Again, what may be called a relative, rather than absolute bar to marriage may exist in the degree of relationship between the parties. They may marry most other people; but not one another. A formidable table of "prohibited degrees" used frequently to adorn the porch of a parish church; and though this custom is becoming extinct, it is still true that "a man may not marry his grandmother" —and a good many other persons. The rule is, that, subject to a very recent exception, to be hereafter noticed, no one may marry any person who is lineally descended from him or her, or from his or her husband or wife, or from whom he or his former wife is or was lineally descended, nor any collateral relative up to and including the third degree; the blood relations of a man's wife being reckoned for this purpose as his relations, and *vice versâ*, and illegitimate relationships, where clearly established, being as effective as legitimate.

The mode of reckoning degrees for the purpose is, to start with the degree above one of the persons who desire to marry, and to trace it through the links to and including the other person. Until the third degree has been actually counted *and passed*, the marriage (with the exception to be presently noticed) is prohibited. A Table will, perhaps, make this clearer, the reader being requested to note that the inquiry is as to whom John Smith may marry, his wife Mary (Jennings) having recently died. All the prohibited persons are printed in red ink, the marriageable in black; while the number under each name represents the degree of relationship to John Smith.

Upon this Table there are one or two remarks to be made.

In the first place, it may be noted with surprise, that such near relations as Miriam and Sarah Jennings, actual sisters-in-law of the prospective bridegroom, and, therefore, relations in the second degree, are not ineligible for marriage with him. This is the result of the famous Deceased Wife's Sister's Marriage Act, passed in the year 1907, after so many vicissitudes; a statute which is actually retrospective, and which validates such previous unions and their consequences, if otherwise properly contracted. But it must be carefully noted that, as with so many English rules of law, the logical consequences of the Act are not adopted. Thus, though a man may marry his deceased wife's sister, a woman may not marry her deceased husband's brother, nor, it is presumed, may a man

Mary = Abel Smith
2
2
Frances = William White
3
3
Joan White
4
Clara = Arthur Smith
1
1
Martha = George Soames
2
2
Margaret = Henry Black
3
3
Lucy Black
4
JOHN SMITH
Edward
1
Selina = Alfred Jennings
1
1
Miriam
2
Sarah
2
Mary
(deceased)
Jemima
3
Constance
1
Florence = George
2 (deceased)
Charlotte
3

marry his deceased wife's niece, even though she may be the daughter of his deceased wife's sister. Before the passing of the Act, his wife's blood relations were considered as his own; and, as the Act has only removed the disability in one particular case, it remains in the others. And so, John Smith may not marry Miriam's daughter, Jemima, though he may marry Miriam herself, or Sarah. For his deceased wife's niece is, like his own, clearly in the third degree of relationship to a man.[1] But a wife's relations by marriage are no relations to a man. And therefore, if George Jennings, his wife's brother, dies leaving a widow, Florence, John Smith may marry her; for she was related to his deceased wife only by marriage. And two brothers may marry two sisters.

Beyond the third degree of collaterals, the choice is free; and so, in the Table given, John Smith may marry his first cousin, Joan White, or his great-niece, Lucy Black. But relationship of the half-blood counts as relationship of the whole blood; and, as was stated above, *lineal* relationship, or relationship in the direct line, is prohibitory to any extent, up or down. Thus a man may not marry his great-grandmother, even if he should desire to do so; though she is in the fourth degree of relationship only. Nor may he marry his half-sister's daughter, or his father's half-sister; for

[1] Further, the Act expressly continues the former rule that *illicit* intercourse with a living wife's sister is "incest"; though, as a general rule, "incest" means connection with a person whom the accused could never marry. This is important for divorce purposes.

they, though of the half-blood, are within the third degree to him.

It is, perhaps, needless to mention, that sex is a relative bar to marriage. Two men and two women cannot marry; and, if they go through the form of marriage, innocently or fraudulently, the legal result is simply *nil*.

The third and last of the essential qualifications of a valid marriage is consent, which always includes the consent of the parties, and may include that of their parents or guardians.

Where a party to the marriage is above the age of twenty-one, then it is sufficient, according to English law, so far as his or her consent is concerned, that the nature and intention of the marriage ceremony should be understood. But this is essential; and there have been a considerable number of cases in which a marriage has been declared invalid because one of the parties believed that it was a mere betrothal, or a mock marriage, or the like. Similarly, if a party to a marriage ceremony were so drunk as not to be capable of understanding the nature of the ceremony, he might be released; though, regard being had to the formalities now (as we shall see) required for the celebration of a marriage, he might have considerable difficulty in inducing the Court to take that view.

But it is where either of the parties is under twenty-one, and is to be married for the first time, that the special importance of consent comes in. For then the consent of the party is not sufficient; the consent of his or her parent or guardian is also

required, although, where the marriage takes place after publication of banns (as to which we shall speak hereafter), the fact that the parent or guardian does not forbid them is considered to be evidence of his consent. The absence of the consent of a parent or guardian of a minor does not, however, like the want of consent of the parties, render the marriage void, unless the protest is made on the publication of banns. In other cases it only subjects the party wilfully suppressing the truth to the consequences of perjury, and to forfeiture of all property which would otherwise accrue to him or her from the marriage. Under an old statute, the father was the *primâ facie* guardian, then the guardian appointed by him to act after his death, then the mother.[1] Now, by virtue of a recent Guardianship Act, the mother comes second. Where the father is not of sound mind, or any other guardian unreasonably withholds his consent, the Lord Chancellor may, on petition, consent in his place. It is particularly to be noticed that, where the infant is a "ward of Court," *i. e.* where his or her property is being administered by the Court, the person who attempts to induce him or her to marry without the Court's consent, is guilty of contempt of Court, and will probably spend the bulk of his honeymoon amid the unsympathetic surroundings of a gaol.

We now come to the second division of our present inquiry—viz. the formalities required for

[1] The subject of the guardianship of children will be discussed in more detail in Chapter III (pp. 38–41).

the due celebration of a marriage at the present day.

There can be little doubt that, as stated in the previous chapter, Lord Hardwicke's Act of 1753 was intended to put an end to all marriages other than those celebrated according to the rites of the Church of England, with the exception of the marriages of Quakers and Jews, who had long enjoyed *de facto* privileges. But, owing either to ignorance, or to want of skill, the draftsman of the Act, in the penal sections,[1] appeared, as we have said, only to denounce and invalidate marriages irregularly "solemnized" with some attempt at formality, such as "Fleet" marriages; and this language was repeated in the corresponding sections[2] of the Marriage Act of 1823, which replaced Lord Hardwicke's Act. Thus it was possible to argue, and it was argued, that neither statute had any effect upon purely secular marriages; and it was not till the decision in the famous case of the prosecution for bigamy of George Millis, which came before the House of Lords in 1843, that it could be definitely accepted as English law that such marriages were inoperative. In that famous case, Chief Justice Tindal, in delivering the opinions of the judges called in to advise the House, laid it down, that the presence of an ordained priest, or (since the Reformation) deacon, had *always* been essential in England to the validity of a marriage—a conclusion which shows

[1] The important section is No. 8.
[2] Sections 21 and 22.

excess of zeal in the face of the open recognition of Jewish and Quaker marriages by Lord Hardwicke's Act. The Lords in the case were equally divided in opinion; and the decision, in other respects weak, therefore really turned upon a presumption in favour of the prisoner. Still, the decision is usually taken as settling the rule that an informal marriage, unless in the rare cases when it is authorized by express statute, is now invalid by English law. But, if this is so, the choice of formalities open to the parties is considerable.

First in historical importance, and, probably, in actual frequency, is the Anglican or Church form of marriage, celebrated by a clergyman of the Established Church, in a consecrated or, at least, a licensed building, according to the rites of the Church of England, as set out in the Marriage Service of the Book of Common Prayer, and within canonical hours; the latter having, recently, by statute and canon, been extended from 8 a.m. till noon to from 8 a.m. till 3 p.m. Whether the validity of such marriages is derived from the Acts of Parliament or from the authority of the Church, is, of course, an academic question upon which great differences of opinion will prevail; nor is the matter of importance from a legal standpoint. Even the ecclesiastically-minded may accept the view that, for "easing of doubts" and strengthening the power of the Church, the secular arm has interposed the shield and buckler of the State, and, unless exceptionally jealous of lay jurisdiction, will regard with a favourable eye the sections of the

Acts which impose severe penalties upon any person, clerical or lay, who is guilty of irregularity in the observance of those rites of the Church which have thus been formally recognized and adopted by the State.

Of the nature and solemnity of these rites it is not necessary to speak here. They are probably familiar to most readers; and others who are curious may easily satisfy their curiosity either by attending an actual celebration or by reading the "Rubrick" of the Book of Common Prayer. What is important for our present purpose to note is that a Church of England marriage may not be celebrated without previous precautions, which may take any one of three forms, viz. banns, ordinary license, or special license.

The publication of banns[1] is simply an announcement that the person making the announcement has received notice of the intention of the parties to marry. By the Marriage Act, the announcement must be made after the close of the Second Lesson in the church or chapel of the parishes in which both of the parties "dwell."[2] Apparently, there is no rule that banns must be published on successive Sundays; but a precaution against fraud is to be found in the requirement that the marriage must be celebrated within three months of the last publication, and in one

[1] The root is old Teutonic, and is to be found in such words as banner (announcement of rank), banishment (proclamation of outlawry), etc.

[2] Seemingly, no defined period of residence is required to constitute a "dwelling."

of the churches in which the banns were published. Presumably the Prayer Book form of the proclamation must be followed in ordinary cases; for it has recently been found necessary to declare, by Act of Parliament, that where one of the parties is resident in Scotland or Ireland, his or her banns may be published in Scotch or Irish fashion. By still more recent legislation, a relaxation of the general rule has been made in favour of officers and men of the Royal Navy, whose banns may be published at sea if the marriage is intended to be solemnized in England.

The great object of publication of banns is, of course, to give an opportunity to any one who knows of any "just cause or impediment" to the marriage, to declare it; and if such objection is alleged by any person who "forbids the banns," the latter are void, and the marriage cannot proceed —unless, indeed, the allegation should turn out to be unfounded. As has been before mentioned, this is the one ground on which a marriage can be absolutely invalidated on the ground of want of consent by parent or guardian. No rule of law or etiquette requires a person to be present at the publication of his or her own banns. The fee for the publication is only a shilling or thereabouts;[1] for the law distinctly favours this way of marrying, and evidently regards it as the normal one—at any rate for Church marriages.

But persons about to marry may prefer the alternative of a license. And the "common" or ordin-

[1] The exact amount is said to depend on local custom.

ary license is nothing more than a dispensation from banns. It is obtained from the bishop of the diocese in which the marriage is to be celebrated, or his commissary or surrogate, at an expense to the party of £2 3*s*. 6*d*. for the bishop's fee and ten shillings for the Government stamp. But the license is not granted as a matter of course; for one of the parties must swear that he (or she) knows of no lawful impediment, that he or the other party has resided for fifteen days in the parish where the marriage is to be celebrated, and, if one of the parties is a minor, that the proper consent of parent or guardian has been obtained. The marriage, to be valid, must, as in the case of marriage by banns, follow within three months.

The "special" license is only obtainable from the Archbishop of Canterbury, or his officials, at an expense of £30 for his Grace's fee and £5 Government duty. The power of granting a special marriage license is interesting as a rare example of the "dispensing power" formerly exercised in England by the Pope and, with due restrictions, conferred upon the Archbishops of Canterbury by Act of Parliament at the Reformation. The special license is more than a mere alternative of banns; for it allows the parties to marry "at any convenient time or place," thus dispensing with the observance of canonical hours and the use of an ecclesiastical building. In practice an ecclesiastical, though frequently a non-parochial, building is used; and it would appear that the adoption of the Prayer Book service is essential.

Two other precautions are taken by the State to prevent the abuse of Church marriages; but neither of them is an essential in the sense that its omission invalidates the ceremony. Making imperative a practice which had, with more or less completeness, existed since the Reformation, the Marriage Act of 1823 requires the officiating minister to keep a register of all marriages celebrated by him or in his church, and to make periodical returns of the contents of such register to the Registrar-General of Births, Deaths, and Marriages. It also requires the presence of two witnesses, in addition to the officiating minister. Though, as we have said, even the omission of this precaution does not render the marriage absolutely invalid, it has been held that the officiating minister cannot marry himself, *i. e.* be a witness to his own marriage.

As a general rule, any parishioner may require the incumbent of his or her parish to celebrate his or her marriage, at the customary local fee, which is usually of very small amount; provided only that no lawful impediment to the marriage exists. But it is expressly provided by the recent statute that no clergyman shall be required, against his will, to solemnize marriage between a man and his deceased wife's sister; though, on the other hand, he is not to be subjected to any ecclesiastical censure if he does so.[1] A way out of the difficulty is found in another provision of the Act, which

[1] A clergyman who himself takes to wife his deceased wife's sister is liable to ecclesiastical censure.

authorizes an incumbent to appoint a properly qualified substitute to celebrate the marriage.

It is perhaps not easy, without giving offence, to find a common name for the various forms of marriage which are open to any one who prefers, for any reason, not to rely wholly on ecclesiastical authority. Historically speaking, such forms (with the exceptions of Quakers and Jews) date from the year 1836, when the practical monopoly of the Church of England in marriage matters was first broken down. But, even in 1836, the motives and feelings of those who desired to put an end to the monopoly were various; and they have since become even more diversified. Some persons object altogether to the religious element in a marriage; others desire to see their own particular religion recognized; others hold the view that both religious and secular elements should be represented. Parliament has endeavoured to satisfy all these requirements; while, at the same time, preserving the fiction of the monopoly of the Established Church in religious matters. The result has been a bewildering variety of "options," united only by the simple common fact that, for all of them, it is a condition precedent that they should be preceded by a notice to the superintendent-registrar of the district wherein one of the parties resides, and by the issue by the Superintendent-Registrar of a certificate to that effect. We may, therefore, speak of all such marriages as "State marriages," though, as a fact, in some of

them the intervention of the State official is very slight.

In all State marriages, then, proceedings are commenced by one of the parties lodging with the superintendent-registrar of the district in which he or she has resided for at least seven days, of a notice containing particulars of the names, residences, ages, and callings of the parties, and of the building in which it is intended to celebrate the marriage. This notice is accompanied by a solemn declaration (to which the penalties of perjury are attached) by the person giving it, to the effect that he believes there is no impediment to the marriage, that all necessary consents have been given, and that the required period of residence has been fulfilled. This notice is copied into the Marriage Notice Book kept by the superintendent-registrar, which is open to inspection by the public; and any one of the latter may enter a "caveat" or objection to the marriage, though if he do so without reasonable justification he will be liable to an action for damages. For entering the notice the fee is one shilling. There is a Government duty of half-a-crown on the declaration.

So far the proceedings are alike in all State marriages, including those of Quakers and Jews, which were regulated for the first time by the Act of 1836. But, at this stage, a diversity manifests itself. The parties may desire to be married without license, or with license, which, in the case of the State marriages means, not a bishop's license, but a superintendent-registrar's license.

If the parties wish to marry without license, their notice of intention to marry must be posted up in the superintendent-registrar's office for a period of twenty-one days (which, it will be observed, is nearly a week longer than is required for the publication of banns[1]). Only at the end of that time will the superintendent-registrar give a certificate of compliance with the requirement of notice; which certificate, obtained for the modest fee of one shilling, will, in effect, be the warrant to marry. This certificate must then be presented to the proper authority of the building designated in the notice, which may be either a parish church, or a building used for the purpose of religious worship and registered for the celebration of marriages, or the superintendent-registrar's own office. In the first case, the incumbent of the church cannot refuse to perform the marriage on reasonable notice being given him; but the Liturgy of the Church of England is the only form which may be used, and the marriage is in all respects like a Church marriage, except that no banns or license are used.[2] In the second, the marriage is performed by any one whom the owners of the building permit; but, until recently, it had to be performed in the presence of a registrar and two witnesses. The necessity for the presence of a registrar (except in the

[1] Unless, in the case of banns, the parson should insist on his right to have seven days' notice before reading them.

[2] So far as can be surmised, the only attraction of this particular form over the ordinary Church marriage is, that the parties escape both the trying publicity of banns and the expense of a bishop's license.

case of Quakers and Jews) was, however, resented by those religious Nonconformists for whose relief especially the Act of 1836 was passed; and it is now done away with by a pious subterfuge introduced by a statute of 1898, under which there is substituted for the registrar a "duly authorised person," certified as such by the trustees of the building (or some other registered building in the same district)—which "duly authorised person" is, in fact, the minister of the persuasion to which the parties belong. In the third case, where the marriage is celebrated in the superintendent-registrar's office, in the presence of the district registrar and two witnesses, no religious ceremony is allowed; but the parties may, if they and their minister please, subsequently go through the form of marriage prescribed by their own belief. The registrar is entitled to a fee of ten shillings for the marriage.

The advantage of interposing, between the notice to the superintendent-registrar and the celebration of the marriage, a third step in the shape of a registrar's license, is the saving of time thereby effected. It is true that an application for such a license can only be made by a person who has been resident for at least fifteen days in the registrar's district; but, if this condition is satisfied, the license and certificate can be obtained at any time after one whole day from the lodging of the notice, and the marriage can take place at any time after the issue of the license, either in a registered building or in a superintendent-registrar's

office, as in the second or third alternatives where there is no license. Moreover, the notice need not be given by more than one of the parties; and it will not be exhibited in the registrar's office. But for these luxuries, and the additional speed, the applicant must be content to pay the registrar a fee of thirty shillings, in addition to the stamp duty of ten shillings on the license. It is a feature common to all forms of State marriages, that canonical hours must be observed; and certain phrases are essential to the due performance of the ceremony in a Nonconformist building or registrar's office.

So far we have generally assumed that both parties to a marriage have been resident and domiciled in England. But now a few words must be said about "foreign marriages," or marriages abroad of British subjects, and also about marriages between persons one at least of whom is not domiciled in England.[1]

In the first place, we may notice the provisions of the Colonial Marriages Act, 1865, which render valid all marriages, however irregularly celebrated, which a subsequent statute of the colony where they were celebrated has confirmed; provided only that the parties at the time of the marriage, were by

[1] The difference between nationality ("British subject") and domicile is important. The former, as a rule, only governs political questions, such as liability to military service and the right to vote. The latter governs social and commercial questions, including the capacity to marry. More will be said of this in the last chapter of the book.

English law competent to marry. It will be noticed that this Act is not confined to the marriages of British subjects; but it can, of course, have no direct effect outside the British Empire. Thus, if a Frenchman and Frenchwoman, competent to marry, had, in the early days of a British colony, gone through an informal marriage, and such marriages had been legalized by a subsequent statute of the colony, they would be deemed legally married by any tribunal throughout the British Empire. But if, as a matter of fact, their own (French) law, though deeming them competent to marry, regarded a marriage in such a form as null, they would, in France, not be deemed legally married.

Again, by the Foreign Marriages Act of 1892, a marriage celebrated abroad by a British subject before a "marriage officer," *i. e.* a British ambassador, consul, or high colonial official appointed for the purpose by the Secretary of State, is to be deemed valid, so far as regards formalities, in any British Court; notwithstanding that the other party to the marriage was a foreigner, by whose law other formalities were required. But, contrary to the general rule to be explained below, questions of consent are not, for this purpose, to be deemed questions of form. Thus, such a marriage between a domiciled Englishman and a French lady would not be deemed valid under the Act, even in England, if by French law the consent of her parents was required, and it was not, in fact, given. An even more modern statute (the Marriage with Foreigners Act, 1906) has provided for notice

of an intended foreign marriage being given to a registrar in England by the English party, and for the furnishing by the registrar, for the information of the marriage officer, of a certificate showing that proper notice has been given. Provision is also made in this last Act for reciprocal action by foreign countries whose inhabitants desire to marry in England; but, apparently, this desirable arrangement has not yet been carried out.

Apart from these special cases, the validity of the marriage of a foreigner, or of an Englishman married outside the jurisdiction of the English Courts, is judged, or was till lately, by the rule that, in regard to questions of *capacity*, the law of the domicile, or permanent home, of each party prevails; in regard to questions of *form*, the law of the country where the marriage takes place. Thus, if two people domiciled in France, entitled by French law to marry, are married in England, their marriage is valid for all purposes by English law, even though French formalities are not observed. And, for this purpose, consent of parents or guardians is regarded as a question of form by English law. Moreover, generally speaking, the fact that the parties went to a strange country to evade the formalities of their own law, is immaterial. It was on these last two rules of English law that the efficacy of the old "Gretna Green marriages" depended; but, as regards the latter, their attractiveness has been, practically, destroyed by the Marriage Act of 1856, which requires, as a condition precedent to the validity of a Scotch

irregular marriage, the residence for three weeks in Scotland of at least one of the parties.

Finally, it may be pointed out that, desirable as such an ideal is, the attempt to lay down uniform rules on the subject of the validity of marriage throughout civilized countries, remains only an ideal. A marriage which English law treats as binding for all purposes may be treated as null for all purposes by the French Courts; as where an English lady marries in England, according to English forms, a domiciled Frenchman whom by French law she might marry, but who has not, in fact, obtained the consent of his parents, such consent being essential by French law to the validity of the marriage. But the whole difficult question of marriage and divorce according to foreign law will require separate treatment in the concluding chapter of this book.

CHAPTER III

RIGHTS ARISING FROM MARRIAGE

As the mere consequence of the marriage of two persons, certain rights are acquired by each, without any special agreement. Sometimes these rights are, and sometimes they are not, variable by agreement. They relate chiefly to the persons of the husband and wife, to the children of the marriage, and to the property of the husband and wife. We will deal first with the respective rights of husband and wife in one another's persons.

Each party to the marriage has, in theory, so long as he or she is not guilty of misconduct, a legal right to the society and presence of the other; but, in fact, neither of them can, at the present day, effectually enforce that right. In older days, the husband was considered to be legally justified in putting physical restraint upon his wife, if she attempted to leave him; but, in the well-known case of Mrs. Jackson, decided in 1891, the existence of this right was formally denied by the Court, which not only refused its assistance to the husband, but ordered him to refrain from molesting his wife. It is also still said, that a husband cannot be criminally convicted of a rape on his wife, and that he is entitled to administer moderate

physical chastisement, on suitable occasions, to her. But it is more than doubtful whether any Court would now act on these survivals of a past epoch; and, probably, the exercise of the right implied in the former claim would justify a wife in leaving her husband.) It is also said, that a wife cannot refuse her husband admission to her own house, unless they have been formally separated; but here again, the only case reported on the point in recent years went in favour of the wife. Moreover, although if one party unjustifiably withdraws from the *consortium*, the Court will order him or her, by a decree for restitution of "conjugal rights," to return, yet it has for some time been the law that such decrees cannot be enforced by imprisonment; and therefore they are chiefly valuable only as leading to proof of desertion and subsequent divorce or judicial separation. And it seems now quite clear, that if one of the parties is guilty either of violence, or sexual misconduct, or habitual inebriety, the Court will not make even a formal attempt to compel the other to continue cohabitation. But if a wife leaves her husband without due cause, he is justified in refusing to receive her again, should she desire to return; at any rate without an adequate explanation of her conduct. And, probably, the rule is the same if a husband unjustifiably leaves his wife.

It is, however, chiefly in relation to third parties that the legal right of *consortium* in husband and wife is of practical value; though, even here, its effectiveness has diminished of late. Thus, it used

to be clear law, that a person who enticed away another's wife, or harboured a wife who had improperly left her husband, was liable to an action for damages by the husband; though there never seems to have been any corresponding right in the wife. But, although the action for "enticing" has been successfully brought quite recently, it seems difficult to maintain that a wife cannot be prevented from leaving her husband, and yet that a person who merely gives her shelter commits a wrong. If actual misconduct has taken place between a wife and another man, a husband can obtain damages against the latter in the Divorce Court; though hardly without joining a petition for divorce or separation. But a wife has not, and never had, any right to damages against a woman who has been guilty of misconduct with her husband; though she may make her a co-respondent in the Divorce Court.

Where, however, the right of *consortium* is infringed in other ways, as by the infliction, negligent or intentional, of physical harm on one of the parties to the marriage, the other party may have an action against the wrong-doer for loss of the comfort and society of the injured person. Thus if a married woman is negligently run over by an omnibus, and, as a result, is confined to a hospital for three months, her husband may recover damages from the omnibus proprietor for his own loss, in addition to any damages which the wife may recover for her sufferings. And the same holds good of a wife whose husband has been injured. But if the injury result in the death of the

injured party, then the claim of husband or wife will be limited to the pecuniary damage which he or she has suffered by the death. For the old common law did not allow a civil action to be founded on the death of a human being; and Lord Campbell's Act of 1846, which first allowed such action, limited it to the pecuniary loss suffered by the plaintiff, while the Employers' Liability and Workmen's Compensation Acts have followed a similar rule.[1]

Still more, it is only as against third parties that the rights given to parents over children can really be described as rights. For, happily, whatever may have been the case in former times, the law now regards such powers as exercisable only for the children's benefit, and will interfere if they are being abused. But, so long as such abuse does not occur, they are enforceable by the parents, with the assistance of the Courts, against third parties; and are, therefore, true legal rights.

According to the old common law, a father has the primary and complete control over the person, the education, and the religious up-bringing of his lawful children during his lifetime. So clearly is this the case, that even a promise given by him on marriage, that the children shall be brought up in a particular religion, does not bind him, if he honestly refuses to be bound by it; and, until

[1] There would seem to be no legal objection to recovering for loss of *consortium* up to the time of death, if an interval elapsed between the infliction of the injury and the death. In fact, such a claim was allowed in an old case.

recently, a covenant by him, in a separation deed, not to insist on the custody of a child, was inoperative. Further, by an old statute of the year 1660, he is entitled, by deed or will, to appoint a guardian of his unmarried children to act after his death, until the children attain twenty-one.[1] As a matter of fact, however, the practical control, both of parent and guardian, over the person of the child, largely ceases when the child attains sixteen; during the remaining five years of his legal infancy, the rights of parent and guardian are almost confined to his property. And, even in that respect, they are always subject to the powers of any trustees in whom the property may have been vested for the benefit of the child.

But this primary right of the father may be substantially interfered with at the present day. Thus, in any case, a mother may, in the discretion of the Court, be allowed the custody of, or access to, her child under the age of sixteen; and a covenant by her husband to allow her the custody of the child will now be enforced by the Court, if it thinks fit, in the interests of the child. By a very recent statute, any parent or other person convicted of cruelty to a child under sixteen may be deprived of the custody of it; and the Divorce Act of 1857 provides, that the Court, during or after any

[1] The appointment of a Roman Catholic or an atheist is invalid under the Act; but the Court may appoint a Roman Catholic nominated by a deceased father. There appears to be no corresponding restriction on the appointment of a guardian by a mother under the Act of 1886 (*post*, p. 40).

suit for divorce, judicial separation, or nullity of marriage, may make any order that it thinks fit as to the custody, maintenance, and education of the children of the marriage. Finally, the Court may refuse its assistance in the matter of recovering the custody of a child, to any parent who has abandoned or deserted it; or may, as a condition of its assistance, require the parent to refund to the foster-parents any sum of money expended by them for the maintenance of the child. In cases, however, in which a father or guardian is unjustifiably deprived of the custody of a child, his powerful remedy is the great writ of *Habeas Corpus;* disobedience to which is visited with severe penalties.

As we have said, a father was, by a statute of 1660, also given the power of appointing a guardian of his unmarried infant child after his (the father's) death. Of course, he might, and often did, appoint the child's mother. But, if he did not, it was hard on the mother that the custody of her child should belong to some one who might be a stranger to her and the child. Accordingly, it was provided by the Guardianship of Infants Act, passed in the year 1886, that, on the death of a father, the mother, if she survived, should be guardian of her infant children. If the father has appointed a guardian, such guardian and the mother are to act jointly; if he has not, the Court may appoint a guardian to act with the mother. But the Act goes even further, and allows a mother, by deed or will, to appoint a guardian to act (along with the father's guardian) after the death of both

parents, or even, subject to the discretion of the Court, to share the guardianship with the father, should he survive the mother, and should the Court deem him unfit to have sole guardianship.

It will be noticed, however, that none of these changes, important as they are, affect the primary right of a father, who is not guilty of any misconduct, to the sole control, during his lifetime, of the custody, maintenance, education, and religious upbringing, of his infant unmarried children—at least till the age of sixteen.

In the third place, we have to consider the rights of husband and wife in one another's property, in which matter sweeping changes have been introduced during the last century. For the sake of clearness, we may first deal exclusively with the rights of the husband, and then with the rights of the wife.

At the common law, and in strict accordance with feudal principles, a wife's lands remained hers during her life, and passed, on her death, to her heirs—*i. e.* her blood relations. Neither the husband, nor any relations of his, as such, could inherit her land. But the husband was entitled to receive the rents of the land during the marriage; and, on the birth of any child of the marriage, capable of inheriting as the wife's heir, the husband acquired a life interest in the land for his own benefit, which was not put an end to by the death of the child or the wife. But if there were no issue of the marriage, and the wife died, the land went to her relations absolutely. She could not will it;

and she could not dispose of it during her lifetime, except, with the consent of her husband and the approval of the Court, by a special form of fictitious lawsuit, known as a "fine," or "common recovery."[1] This is still the law with regard to a woman married before 1883, so far as regards land acquired by her before that date; unless the land was expressly conveyed to her "for her separate use." In that case, she will be able to dispose of it by deed or will; and only if she fails to do so will her husband be able to claim a life interest on her death, and then only if there have been children of the marriage capable of inheriting the land.

But if the marriage took place after 1882, or if the land was acquired after that year, it will belong to the wife as her separate property, and will be entirely at her disposal, unaffected by any claims of her husband. Only in the event of her death, leaving the land undisposed of, will the husband, provided that a child of the marriage capable of inheriting has been born, be able to claim a life interest in it. On his death, it will go, as before, to the wife's heirs.[2]

[1] In 1833, an Act of Parliament substituted a simpler form of conveyance for these clumsy proceedings. But the principle remained unaltered.

[2] It is understood here that the necessary modifications must be made, if the wife's interest is limited in character. Her life interests, of course, end at her death; and so she cannot will them, nor can her husband enjoy them after her death. Similarly, she cannot will an entailed estate; but the husband gets his "curtesy" if an heir has been born of the marriage. Copyhold lands are subject to local customs in such matters. But these are all points of general land law, not of the law of husband and wife.

With regard to the wife's "personal" property—*i.e.* all property other than freehold or copyhold estates—this, by the common law, passed to the husband on the marriage. Concrete or "corporeal" chattels, *e.g.* furniture, jewellery, and cash, vested *ipso facto* in him; things like leases,[1] stock, bonds, ordinary debts, or "choses in action," as they were called, could be claimed, and thus "reduced into possession," by him. Thus, a banker was bound, on proof of the marriage, to transfer the wife's account to the husband's name; if the husband demanded it. But if the husband or the wife died before the husband's right was exercised, the right ceased to exist; except that, if the wife died first, the husband, subject to the wife's debts, could claim the property as her administrator. The wife could make a will of personalty with her husband's consent; but he could disallow it after her death, and, besides, it is difficult to see what she could have to bequeath.

Of course this state of the law was considerably modified by the equitable rule before referred to: that any property expressly given to a woman, before or after marriage, "for her separate use," was free from her husband's control. With regard to that, she could act as a single woman; but again, if she left any of it undisposed of, in her lifetime or by her will, the husband could claim it on her death.

[1] By English law, leases for years, however long and valuable, are reckoned, for most purposes, as "personal property," not as land.

It was, undoubtedly, this important principle of the "separate estate" which was adopted by the legislature as its model in the famous Married Women's Property Act of 1882, which, as we have said before, placed all women married after 1882, with regard to all their property, in the position of unmarried women, and, as regards women married before 1883, had the same effect on all property acquired by them since 1882. The husband's right by survivorship is only exercisable where the wife has not made a will; and it is subject to her debts.[1]

The rights of a wife in the property of her husband have been no less radically altered. At the common law, a wife, on surviving her husband, was entitled to a life income of one-third of all the heritable lands (including entailed estates) to which her husband was legally entitled for a present estate, *at any time during the marriage;* whether he had disposed of them before his death, or not. This right she could only release by a fictitious lawsuit of the kind alluded to above; and, consequently, purchasers of land were often disagreeably surprised by a claim for dower by the widow of a former owner. This inconvenient state of things was only partially remedied by a series of clumsy clauses in conveyances, known as "uses to bar dower"; but, in the year 1833, it was done away with by the Dower Act, which limited the claim of a widow to lands belonging to her husband at his

[1] The writer is aware that special rules apply in the cases of women married between 1870 and 1883. But these special variations cannot be stated here. They are not very serious.

death, and made it subject to any debts, charges, or dispositions created in his lifetime or by his will, and even to any expression of his intention in any deed or will, to the effect that any land should be exempt from claim to dower. Indeed, a provision made by the husband's will for his widow out of any land out of which she is *primâ facie* dowable, will by implication bar her claim to dower out of all his land. As a small compensation for these sweeping reductions, the Dower Act allowed a widow to claim dower out of land to which her husband was entitled at his death for a heritable interest in equity only [1]—subject, of course, to the dispositions previously explained. Where dower can still be claimed out of legal estates, the widow is entitled to have her thirds "set out by metes and bounds"; where the land is in the hands of trustees, or a mortgagee, she is entitled to one-third of the net income. In practice, she gets the latter in all cases where her claim can be supported.

It is not necessary, to support a claim of dower, that the widow should have actually had children by her husband. It is sufficient if any child she might have had by him could have inherited the land from or through the husband.

As regards the husband's personal property—in-

[1] For example, if a man is entitled to freehold land subject to a legal mortgage, he is not legal owner of the land, but has only an "equity of redemption." Similarly, if he is entitled to freehold land vested in trustees for his benefit. Now, if he dies intestate and without barring dower, his widow may claim dower in both.

cluding leases, money, stocks and shares, interests in business, and, in fact, everything but freehold and copyhold estates[1]—the wife's claims have been improved in recent years. Under the old Statute of Distributions of 1670, which practically followed the custom of the province of Canterbury, a man's widow was entitled, if he died intestate, to one-third of his net personal property if he left children or other descendants, to one-half if he did not. Where the husband left no relations, or only distant ones, and his estate was small, this was a great hardship on the widow; whose claims were more obvious than those of distant relatives or the Crown. Accordingly, in the year 1883, a statute was passed giving the widow of an intestate who died leaving no issue a right to the first clear £500 of his estate, to be taken rateably from land and personalty, without prejudice to her claims on the residue, either by way of dower or widow's share.

But, of course, it must not be forgotten that a husband may, without reason assigned, by his will deprive his widow of all share in his property, except what may have been settled upon her by deed, or merely by giving it away to other persons. This complete liberty of disposition, which, as we have seen, has now been extended to married women, is peculiar, it is believed, to English law, and certainly needs considerable justification.

[1] The widow's claim on her deceased husband's copyholds, like his on hers, are settled by the special custom of the manor of which the copyholds are held. Usually, under the name of "free bench," she gets a substantial interest.

Another point which seems to have been overlooked by the legislature is, the right of a mother to succeed to the personalty of her deceased child. If she is a widow, and the child has died intestate and left no offspring, she shares equally with her other children, the deceased's brothers and sisters. But, if her husband is living, he takes the whole, to the exclusion both of her and the deceased's brothers and sisters. When a wife's personalty went to her husband, there was no particular hardship in this rule; it was merely part of the ordinary law. But, now that what a wife acquires belongs to her alone, the rule would seem to require reconsideration.

A subject on which some considerable misunderstanding as to the law exists, is that of the "housekeeping allowance." It is the practice with many husbands (though the wife cannot demand it as a right) to make their wives a weekly, monthly, or quarterly allowance for household expenditure. As we shall hereafter see, the existence of this practice may make a considerable difference to the husband's liabilities towards third persons. As regards husband and wife, it is a mere matter of convenience. The money remains the husband's; even though it is put in the wife's bank. In the spending of it, the wife acts simply as the husband's agent; and she may, strictly, be called upon to account for every penny of it. And though, as a matter of fact, a husband does not often expect to see any of it back, yet, in the absence of special agreement, he can, strictly, demand any balance

left over after payment of household accounts, or even recover the unexpended balance at any time. If the wife has invested it in her own name, the Court may, in a summary way order the investment to be transferred into the husband's name. If he goes bankrupt, it belongs to his creditors; if he dies, his executors are entitled to it; if the wife dies, the husband can claim it as his own money, without any authority under his wife's will or intestacy. Of course, if his title is disputed, he will have to prove the facts; but it will be easier for him to do so, than for the wife or her representatives to satisfy the Court that the money was intended to be her property.

It may, perhaps, also be pointed out, that though, probably, a wife has herself free right to make use of the house which the husband has fixed as the matrimonial abode, she has no right to invite any one thither without her husband's permission. Of course if the house belongs to the wife, or is taken in her name, the rule is (as we have already seen) just the other way; in fact it is doubtful, in that case, whether the husband has himself a right to enter the house. This is not a rule of marriage law at all; it is simply the ordinary rule affecting the occupation of land, that no one can enter upon the land without the consent of the occupier, or express legal authority. A similar rule applies to all questions regarding the management of the house; such as the allotment of the rooms for various purposes, the arrangement of the furniture, the style of the decorations, the hours of meals, the

extent of the establishment, and so forth. The person, husband or wife, by whom the house and the household expenses are provided, is entitled to regulate such matters. If the other party cannot reconcile himself or herself to the arrangements, he or she must withdraw from the house. Probably, however, if the arrangements made by a husband were so unreasonable as to constitute an unworkable system, the wife, if she withdrew, would not be held to have "deserted" her husband in the legal sense.

Finally, in closing this chapter, we may point out that now a married woman has all civil and criminal remedies in her own name against all persons, including her husband, for the protection of her property. If she lends money to her husband, to be used in his business, or otherwise, she may recover it by ordinary action; though, if he goes bankrupt, she may be postponed to his other creditors. It is, however, laid down by the Married Women's Property Act, that a married woman shall not take criminal proceedings against her husband, in respect of her property, whilst they are living together, nor, after separation, in respect of acts done before separation; except in respect of her property wrongfully taken by the husband on leaving or deserting her. She may, nevertheless, both during and after separation, sue her husband on contracts made by him with her, and also in respect of "torts," *i.e.* civil wrongs not arising out of contract, such as trespass and the like, for the security and protection of her separate property.

The husband's remedies against his wife seem much less clear. He can, apparently, sue his wife on contracts; but, in spite of the ambiguous wording of the Married Women's Property Act, it seems doubtful whether he can ever sue her in tort, even in respect of her separate property, or for the protection of his own. All disputes between husband and wife as to the ownership of property may be decided on application in a summary way to the judge of the County Court in the district in which either party resides. Such applications may, on request of either party, be heard in private.

CHAPTER IV

LIABILITIES ARISING FROM MARRIAGE

ONE of the primary liabilities undertaken by a man or woman who marries is, of course, for the physical support and maintenance of the other party to the marriage and of the offspring of the marriage. This has been true of the husband for nearly two hundred years; it has only recently become true of the wife, and only to a limited extent. In both cases, moreover, the liability can only be enforced by indirect means; at any rate, so long as husband and wife are living together. No direct proceedings can be taken by husband against wife, wife against husband, or child against parent, in respect of alleged neglect to maintain.

If a husband neglects to provide food, necessary clothing, and lodging, for his wife and children (including her children by a former marriage, and any illegitimate children she may have had when she married him), and they become chargeable to the poor rate, he may be proceeded against by the Poor Law officials on a magistrate's warrant for recovery of the expenses incurred for their relief. The modern form of proceeding is by an application on behalf of the Guardians to Petty Sessions,

for an order directing payment to a specified person; and, on disobedience to the order, the sum demanded can be levied from the husband's goods in a summary way, followed, if the Court is of opinion that the husband can pay and will not, by a committal to prison for not more than three months. Or the Poor Law officials can proceed by the still sharper method of a direct criminal prosecution against the husband who runs away and deserts his wife or children, as an "idle and disorderly person" under the Vagrancy Acts; and, if he is convicted, he will be liable to imprisonment with hard labour for a period not exceeding three months. Where the husband's desertion of his wife is not merely to escape maintaining her, the magistrates may make an order for payment to her by him of a sum not exceeding two pounds a week. But this is in the nature of a separation order, and will be dealt with at a later stage. The liability in respect of the children continues till they attain sixteen; but ceases in respect of the wife's illegitimate children when she dies.

A still more indirect method of enforcing the husband's liability is, for the wife to pledge her husband's credit for necessaries for herself and the children of the marriage. Such a right only exists where, in fact, the husband does not supply the means to clothe, feed, and house his wife and children, and only to the extent of such deficiency; and the burden of proving the facts rests upon the tradesman who supplies the goods. It is also confined to such goods as are, in the opinion of the

jury, necessaries for the wife and children; regard being had to the means and position of the husband.

Apparently, the husband's liability is not affected by the fact that his wife or children have separate property, or by the fact that the wife is capable of earning her own living. But, in the event of proceedings of a criminal character being taken against the husband, the magistrates would, doubtless, take such facts into account.

The liability of the wife for maintenance of her husband and children is quite of recent date, and rests upon the Married Women's Property Act of 1882. That statute provides that she shall be liable, *to the extent of her separate property*, for such maintenance;[1] and it is presumed, therefore, that no order could be made upon her by the magistrates beyond the proved extent of such property. Certainly it was decided, in the year 1877, that a similar liability imposed on a married woman by the Married Women's Property Act of 1870 did not justify the magistrates in committing a married woman to prison for running away and leaving her children; though, in fact, in that case she had herself been deserted by her husband. Probably also, though the matter is by no means free from doubt, the wife's liability in respect of the children is supplementary to that of the husband, and can only be resorted to when the latter fails. But the Act is not clear on the point; and such a view

[1] This liability has quite recently (1908) been extended to the maintenance of the wife's parents.

might work great hardship on a man of small means whose wife (as has been known to happen) deserted him and their children on coming into a fortune.

A recent addition to the responsibilities of both husband and wife is the statutory liability of both (and of all persons having charge of children) to cause the children to attend school between the ages of five and thirteen (possibly fourteen), or, at least, to "receive efficient elementary instruction in reading, writing, and arithmetic." This liability is enforced through the attendance officer, who, on the instructions of the local education authority, summons offending parents before Petty Sessions, and obtains an "attendance order," for breach of which a penalty of five shillings (including costs) may be imposed.

The liability of the husband to pay the debts incurred by his wife, whether before or after the marriage, has always been the subject of keen discussion amongst lawyers and moralists.

As the law stood two hundred years ago, the husband, on marrying, as he took over all his wife's personal property, assumed entire responsibility for her existing debts; whether known to him at the date of the marriage or not. A married woman was, however, then incompetent to contract; and, therefore, he incurred no subsequent liability for her debts, other than the "necessaries" spoken of above (p. 52), except so far as she acted as his agent. On this latter point there was a good deal of uncertainty. It was so frequent, in almost every

rank of society, for the husband to allow his wife to make purchases, and himself to discharge the bills, that the idea grew up among tradesmen, that the husband could not repudiate such a liability, at any rate without formal notice, so long as he and his wife lived together. But a series of important decisions in the Courts at last made it clear that this last view had no legal foundation; and all that remains now of the old idea that a wife could "pledge her husband's credit," is a mere presumption in the tradesman's favour that a woman living with her husband is authorized by him to order goods reasonably suitable for the establishment apparently sanctioned by the husband. This presumption may be rebutted by proof on the husband's part that he has either (1) expressly or by implication forbidden his wife to pledge his credit, or (2) that he has, in fact, given her sufficient money to keep up the establishment. In the latter case, the husband's defence is complete; in the former, the tradesman can only succeed on the ground of the wife's right to pledge her husband's credit for "necessaries," if he has actually left her without means of support. Claims on this ground are usually for goods and services only, and not for money lent; but if a friend has lent money to the wife for the purpose of providing necessaries, and the money has, in fact, been so used, the lender, as standing in the tradesman's shoes, may recover the amount from the husband.

We then come to the question of the wife's liability for her own acts. As we have previously

stated, a married woman was, by the old law, incapable of contracting, except as her husband's agent. Therefore she could incur no new personal liability on a contract, though she remained liable (along with her husband) for debts contracted before her marriage. But when the Court of Chancery began to recognize her as capable of owning separate property (see p. 66), it not unnaturally came, in course of time, to recognize her capacity to make it liable for her engagements. At first, the liability was only indirect, and was only recognized where the engagement had been entered into by some formal document, from which a promise to charge the property could be implied. But the doctrine gradually extended; until, by the Act of 1882, a married woman is deemed to contract, in every case, so as to bind her separate property, which, as will be remembered, was largely increased by that Act. Still, however, the conservatism of the Courts maintained that if a married woman had *no* separate property when she incurred a debt, she could not be "deemed to contract" in respect of it. But this construction was expressly abolished by the legislature in 1893; and a married woman is now assumed, except where she, in fact, contracts as her husband's agent, to contract in respect of all her separate property, whether present or future, with the very important exception of the income which she is "restrained from anticipating," in manner to be explained hereafter. Her liability, however, is not, like her husband's, an absolute one. It is limited to the amount of her

separate property; and judgment can be given against her only in respect of her separate property. Subject, however, to the important exception, that no debt can be enforced against any property "restrained from anticipation" which had not actually reached her hands when the debt was incurred, a married woman's debts are not "charges" upon her separate property, to be paid in order of date, but general liabilities enforceable against her to the extent of her separate property, according to the promptness or otherwise with which they are enforced.

Intentionally or unintentionally, the doctrines as to a married woman's liability for her debts thus gradually built up, have left one great anomaly in the law, which came to light in a recent case. A married woman, believing that her husband has authorized her to make a particular purchase, goes to a shop and orders the article, saying: "Enter it to Mr. B——" (her husband). The shopkeeper does so; and, in due course, sends in the bill to the husband, who promptly repudiates it. The husband has never paid his wife's bills at that shop; and, therefore, he has given the shopkeeper no right to believe that he will do so. As a matter of fact, he has kept his wife properly supplied with money; so there is no claim on the ground of "necessaries." The husband will certainly succeed in his defence. If the tradesman then sues the wife, with a view of making her separate property liable, he will also be defeated; unless, perhaps, he can prove actual and intentional deception on her part.

For he clearly gave credit to the husband, not to the wife; and, therefore, he cannot charge the wife.[1]

With regard to the debts of a married woman incurred before her marriage, for which, as we have seen, the husband was at one time liable, the husband's liability is now limited to the extent of any property which he may have received through her. The wife, however, remains liable, to the extent of her separate property, for all liabilities incurred before her marriage; and she cannot evade her responsibilities by settling her property, at her marriage, either on herself or her husband.

With regard to the wife's "torts," *i. e.* her wrongs (regarded as the subject of civil proceedings), such as libel, trespass, misappropriation of money, or the like, the law is substantially different. Her own liability in such matters is quite unaffected by her marriage (except so far as a "restraint on anticipation" protects her property against her torts committed after the marriage)—certainly so far as criminal proceedings go, and probably also in respect of civil proceedings; while her husband is only liable to the extent of the property which he has received through her.[2] As regards her torts committed during marriage, she is likewise liable; and it is doubtful whether her

[1] Probably, though not certainly, he could recover from the wife the articles sold, if they were still in her possession. But the point appears not to have been decided.

[2] It seems a little doubtful if this liability continues after the wife's death. The old liability of the husband disappeared at the wife's death.

liability is limited, as it is in contract, to her separate property. But her husband is also liable, to the full extent, for her torts committed during marriage —at any rate whilst they are living together; and it is doubtful whether he has any remedy against her property. If not, there is obvious opportunity for very cruel blackmailing of the husband by the wife, acting in collusion with a third party.

A wife incurs no liability for her husband's debts or liabilities; except in so far as he is, with her authority, acting as her agent. And neither husband nor wife is liable (except through the Poor Law, as above explained) for the debts or liabilities of their children, or for wrongs committed by their children; again, except in so far as the children are acting as their agents. For it must be most carefully remembered, that the rules we have set out in this chapter are only general rules, which, in most cases, can be varied by the express or implied agreement of the parties. Thus, if a husband allows his wife to deal with a particular tradesman, and pays her bills, he cannot afterwards repudiate her dealings with the same tradesman, even though he has forbidden her to continue them, and has provided her with plenty of money; unless he has given that tradesman express notice to cease giving credit to his wife. For the tradesman was entitled to assume, from the husband's payment of the bills, that he approved of her dealings; and a subsequent change of attitude, until communicated to him, cannot affect the tradesman. But if there has been no such evidence of approval

by the husband, the general rule applies; and the tradesman deals with the wife at his own risk.

In concluding this part of the subject, reference may be made to one point on which the liability of the husband for his wife's conduct has recently been substantially lessened. This is in the matter of the wife acting as a trustee. The liabilities of a trustee are very considerable; and he or she may easily become responsible for large sums through slight negligence. Formerly, a husband was liable for all his wife's breaches of trust; presumably on the ground that, if he allowed her to act as a trustee, he treated her as his agent for the purpose. The wife, apparently, was not liable at all. Now, however, the husband, unless he intermeddles with the affairs of the trust, is not liable for his wife's breaches of trust. The wife is, on the other hand, liable to the extent of her separate property.

CHAPTER V

SPECIAL PRIVILEGES AND DISABILITIES OF MARRIED WOMEN

In addition to the general principles explained in the last two chapters, there are a considerable number of anomalous rules of law affecting the position of a married woman which hardly create rights or liabilities. They are the more interesting and important because they are, in most cases, survivals of the old status ideas, which are being rapidly replaced by the doctrine of free contract. For the most part they cannot be affected by any agreement between the parties; they can only be got rid of by Parliamentary enactment.

In the first place, then, we may notice that, even in criminal proceedings, a married woman sometimes enjoys exceptional favour. Thus, if a wife engages, in the company of her husband, in any except the very gravest forms of crime, she is excused from punishment, as acting under his coercion; unless it is actually proved that she acted on her own initiative. Thus, if husband and wife join to commit a theft or utter counterfeit coin, the wife cannot be convicted; unless, which would be very difficult, the prosecution can show that the wife has, in fact, been the instigator of the crime.

The rule does not apply to such serious offences as treason, murder, or, perhaps, robbery with violence; nor does it apply to offences for which the wife is supposed to be the more specially responsible, *e. g.* keeping a house of ill fame. But it applies to the great majority of the more common crimes; and the result is, that married women enjoy practical immunity in such cases, if they act in concert with their husbands.

A second privilege of a married woman is also concerned with the criminal law. In the ordinary way, a person who "harbours" or assists a person whom he or she knows to have been guilty of a felony, and thus aids him in escaping from justice, is liable to special punishment as an "accessory after the fact." But a married woman who assists her husband to escape from justice, knowing him to have committed a felony, is not so liable; and, whether, in fact, this exemption is more for the benefit of the husband or the wife, it is legally the wife's privilege, and can be claimed by her in proceedings instituted by the injured party.

A third and most important privilege is concerned with civil liabilities. It may have been noticed that, in speaking in the last chapter of the various liabilities which have been imposed upon married women in recent years, we also used the expression "to the extent of her separate property," or the like. This language points to a great difference between the civil responsibilities of a married woman and those of a man or an unmarried woman. The liabilities of the latter are *personal,*

i. e. they can be enforced to the full extent of the debtor's capacity. And, though imprisonment for debt is, in most cases, now abolished, yet in fact the exceptions are very considerable; and hundreds of men and single women are annually committed to prison under them. Thus, a man who does not support his wife and children, a man who loses money entrusted to him in a fiduciary capacity, and a man who refuses to pay an ordinary debt which the Court thinks he can pay if he likes, may be, and frequently is, committed to prison; while, in all these cases, the liability of a married woman is confined to the extent of her separate property, and, beyond that, she incurs no liability. Probably, though not quite certainly, the same rule applies where she has committed a "tort," *e. g.* a trespass, a libel, or negligence causing damage. In the last class of cases, too, as we have pointed out, the injured party may, and probably will, sue the husband in preference to the wife; and the husband has, apparently, no means of recovering his loss from the wife's property.

A fourth privilege of a married woman is that she cannot be made a bankrupt, unless she is carrying on a trade separately from her husband. Even then the bankruptcy will be confined to her separate property; and, therefore, presumably, will carry with it none of the peculiar personal disabilities which attach to the ordinary "undischarged bankrupt." It may be said that the incapacity of the non-trading married woman to be made bankrupt is a disability, rather than a privi-

lege, inasmuch as she is thereby prevented from getting rid of her debts, otherwise than by paying them in full. But, as her liability is, in all cases, confined to her property, the disadvantage must be small. On the other hand, as we have seen, a woman who has lent money to her husband for purposes of his trade or business cannot claim in his bankruptcy until all the other creditors have been paid in full; though this is hardly a special disability of a married woman, as the same rule would, at any rate in some circumstances, apply to a husband who lent money to his wife to enable her to carry on a separate trade.

A curious freak of bankruptcy law in connection with married women came to light a few years ago. A creditor presented a petition against a single woman trader, praying that she might be made bankrupt. At the first hearing of the petition the lady begged for an adjournment upon some ground or another. When the petition came on again, she blandly announced that she had taken advantage of the interval to get married. It was decided that she could not be made bankrupt on the petition. As a married woman can only be made bankrupt when she has been carrying on a trade "separately from her husband," and as the lady in question, when she carried on the trade, had no husband, there was no case against her![1]

The fifth, and by far the most important of the

[1] It is an interesting question whether the creditor would have been entitled to "forbid the banns" if he had got wind of the project.

civil privileges of a married woman, is the fact that property may be settled upon her, and upon no other class of persons, "without power of anticipation," *i. e.* in such a way that she cannot, directly or indirectly, pledge her future income for any liabilities, and can go on receiving it with impunity, in spite of the fact that she is heavily in debt. As we have said, such a privilege can be enjoyed by no one except a married woman. The utmost that can be done, in the case of a man or an unmarried woman, is to provide that his or her income shall cease altogether if he or she attempts to encumber it; and even this is done with difficulty, and does not protect any income which may have actually been received. But a married woman may have a thousand pounds lying at her disposal at the bank, and yet may refuse to pay a single one of her debts out of it, on the ground that these debts were incurred before the money was received by her. Such a remarkable privilege deserves a special word of explanation.

When the practice of making marriage settlements became popular through the troubles of the Civil War, it was at first confined to the land-owning classes. The settlement was, in nine cases out of ten, a settlement of the husband's estate; and, if the wife had any money, it was paid over to the husband (in accordance with the existing law), in consideration of his giving her an annual charge for "pin-money" on his estate during the marriage, and a larger sum, in lieu of dower, after his decease. The lady, or her father, in fact pur-

chased an annuity charged on the husband's estate; and, as this was an interest in land, the wife could not dispose of it (except by a troublesome form of conveyance) during the marriage.

When the practice of making settlements spread to the commercial classes, it became customary for the lady's father, or the lady herself, to vest her fortune in trustees, who were instructed to hold it "for her separate use"; and this kind of property, the Court of Chancery, as we have seen, began to treat as the married woman's very own, apart from her husband, and subject to her disposal. If the property was given to her absolutely, she could dispose of it entirely; if she had only a life interest, she could dispose of that.

But the power of disposal was found to have its drawbacks; for it not infrequently happened that the threats or cajoleries of the husband succeeded in persuading the wife to exercise the power for his benefit—which, be it remembered, she could do without any of the formalities imposed by the old common law. A peculiarly scandalous case which occurred towards the end of the eighteenth century, in which the lady cancelled the provisions made for her security "whilst the wax was (figuratively) yet warm on the deed" (of settlement), aroused no less a person than an ex-Lord Chancellor to invent and insert, in a settlement of which he was trustee, the now famous "clause against anticipation," which, after some period of doubt, was pronounced binding in a similar case. It is good to have an ex-Lord Chancellor for your trustee.

The purport of the clause "against anticipation" is: that the trustees shall pay the income of the trust fund into the proper hands of the wife, who shall have no power either to alienate or to anticipate any payment of income, directly or indirectly. Thus, not only will any bond, mortgage, promissory note or other formal security, given by the married woman, be inoperative as regards the future income; but even if she orders a fur mantle of a tradesman, remarking at the time: "I fear I cannot pay you till I receive my next quarter's income," the tradesman has nothing but her honour to trust to. She may pay him out of her next quarter when it is received; but he cannot compel her to do so, whether he knew of the circumstances or not. It has even been held, that debts so incurred cannot be enforced against subsequent income received after the dissolution of the marriage, and still lying at the lady's bank. And even though the married woman may have power to dispose, absolutely or with restrictions, of the capital of the fund settled to her separate use, yet, if there is a "restraint on anticipation" of income, such disposition will not operate till her death, or other dissolution of her marriage.

It should be carefully remembered, that this remarkable privilege only arises under express provision by the donor of the fund; and that a woman about to be married cannot avail herself of it by settling her own income on herself so as to defeat her *existing* creditors. But such a disposition, if made by herself on her marriage, will protect her

against *future* creditors, even her own. And such a gift by another person will protect her against past and future creditors. Moreover, though the clause can only be enforced on behalf of a married woman, yet it may be imposed on a gift to a single woman, and will arise on her marriage, and even revive on a subsequent marriage; unless she has, in the meantime, whilst unmarried, done some act to put an end to it.

The writer does not forget the obvious argument, that this peculiar privilege of a married woman may, and frequently does, benefit both her husband and children, by keeping the home together in time of financial difficulty. The facts remain that it was not introduced for that purpose, that it need not be used for that purpose, and that it may be, and often is, made the means of inflicting upon honest tradesmen something very like fraudulent imposition.

A sixth, and valuable privilege enjoyed by a married woman, arises under the power conferred on a husband by the Married Women's Property Act of 1882, to insure his life for the benefit of his wife and children by a policy which shall be free from the claims of his creditors. In the ordinary way, of course, the husband's life policies are liable, after his death, for the payment of his debts; but if they are expressed to be for the benefit of his wife or children, or both, they will not be part of his estate, and will constitute a trust for the wife or children, or both, as the case may be. The only restriction on this privilege is the right which

the husband's creditors have, if the arrangement was made with a view of defrauding them, to receive out of the policy moneys a sum equal to the amount of the premiums so paid. There is a similar power vested in a married woman of insuring her life for the benefit of her husband and children, or both.

A seventh peculiarity of a married woman's position can hardly be described as a privilege; though it, undoubtedly, arose originally out of her privileged position. It is rather an irregularity which appears during proceedings for separation, to be more particularly described in the following chapter. Broadly speaking, a wife, until proved to be guilty of misconduct, and sometimes even after proof of misconduct, is entitled to an order for maintenance or "alimony," at the discretion of the Court, against her husband; while a husband never has a similar right against his wife. This anomaly is especially striking in cases where, under the Licensing Act of 1902, to be hereafter explained, a man obtains a separation order on the ground of his wife's habitual drunkenness. No doubt he is well rid of her society at any price; but it seems *primâ facie* unjust that the guilty party should be entitled to an order for maintenance against the innocent.[1]

Finally, another anomaly, rather than a privilege, affecting married women may be briefly alluded to. Under the Income Tax Acts, the income of a

[1] Unless, perhaps, where the wife agrees voluntarily to go into an Inebriates' Retreat.

married woman living with her husband is deemed to be his income; except where she is conducting a separate business. Two consequences follow from this assumption, which is often now quite at variance with the facts. The first is, that the husband, not the wife, is personally liable for payment of her tax; and, when that is not "deducted at the source," it may be very difficult for him to recover it from her income. The second is, that he may be prevented from claiming a reduction in the rate of taxation of his own income, to which he would otherwise be entitled. Thus, for example, if the husband is earning £800 a year as a doctor, and his wife has an income of £1500 a year from house property, the husband may not only have to pay £75 a year, the tax on his wife's income, but he will certainly have to pay at the rate of a shilling in the pound, instead of ninepence, on his own income, *i. e.* he will have to pay £40 a year instead of £30. And, all the while, the wife may spend her entire income on herself.

It is doubtful whether the small remaining peculiarities affecting husband and wife in the law of evidence ought to be regarded as privileges or disabilities. Broadly speaking, husbands and wives are now competent and compellable to give evidence for and against each other in a Court of Justice, in all civil, *i. e.* private, proceedings, including proceedings for divorce, and proceedings which, under the guise of Crown prosecutions, are really attempts to make people perform civil duties, *e. g.* repairing highways and bridges. But in truly

criminal proceedings, except those for the protection of the wife's separate property, and except proceedings for desertion, assault, cruelty to children, and the like, no husband or wife is permitted to give evidence *against* the other; though, by the terms of a very recent statute, the husband or wife of an accused person may, at the accused person's request, give evidence on *behalf* of such person. And a rule which particularly applies to husbands and wives, though it is not confined to them, is that which exempts any witness from answering any question tending to show that he has committed criminal offence, or the offence of adultery.

When we turn from the privileges of a married woman, and the doubtful anomalies of her position, to her real disabilities, it is difficult to speak of them except in the terms of the famous chapter on snakes in Ireland. Be it remembered that we are not here speaking of disabilities of *sex*, but only of marriage. Thus, for example, political disfranchisement is not a disability peculiarly affecting married women; because, at present (whatever may be the case in the future), it affects all women.

Apart, then, from the very doubtful disability of being unable to act in the thankless office of guardian *ad litem*, it is difficult to name any single disability from which a married woman, as such, suffers in the domain of private law. She may be a testatrix, an executrix, a witness to a will or other document, a trustee, a guardian of her own or other

people's children, a litigant,[1] a contractor, a householder; just as a man or a single woman.

Apparently, owing to an oversight or bad draftsmanship, a married woman may suffer two peculiar disabilities in the domain of public law, viz. a partial incapacity to act as mayor of a municipal borough, or as chairman of a county council, and an incapacity to vote at an election of members for either a borough or a county council. In the year 1869, an Act was passed to remove the disqualification of sex at municipal elections. In the year 1872, the judges, in Mrs. Thompson's case, held that that Act did not remove the disqualification arising from marriage; though it is very doubtful whether such a disqualification (as distinct from the disqualification of sex) had ever existed. In the year 1907, a second Act was passed to get rid of the disqualification of marriage, which the judges, in the case alluded to, had either created or declared to exist. Unfortunately, the framers of the Act removed the disqualification only as it directly affected the right to be elected an alderman or councillor; regardless of the fact that, at least in some cases, a condition precedent to the right of being elected mayor or chairman is a right in the elected person to vote at elections. For the mayor of a borough, or the chairman of a county council, is a person elected by the council from

[1] It seems just possible that, if she is appealing from a judgment given against her, the Court of Appeal will be a little stricter with her than with the ordinary litigant in the matter of giving security for costs. But the practice is by no means clear.

among the aldermen or councillors *or persons qualified to be councillors*. Thus, a married woman who is actually an alderman or councillor will be eligible as mayor or chairman; but an otherwise "fit" married woman who is not, cannot be elected. For, as the decision in Mrs. Thompson's case still stands, no married woman can be on the burgess roll, or vote at a borough or county council election; and being on, or, at least being entitled to be on, the burgess roll, is a condition precedent to being eligible as councillor, though not, under the new Act, a bar to actual election. And, any way, the marriage disqualification for voting at borough and county council elections still stands. But neither of these disqualifications applies to district and parish council elections, or to elections of Boards of Guardians.

CHAPTER VI

DISSOLUTION OF THE MARRIAGE TIE

UNTIL the year 1857, there was in England a pleasing theory that marriage was indissoluble, save only by the death of one of the parties.[1] Never in accordance with actual facts, this theory, derived from ecclesiastical sources, ceased, in the year 1857, to be tenable by any one who believes in the authority of the State to regulate civil obligations. Whether a marriage which has been dissolved by the State continues to exist for spiritual purposes, is a question, not of law, but of theology. Certainly for legal purposes it is at an end.

But, before we reach the extreme step of dissolution, there are more than one minor remedy open to the married person who feels that the full union implied by the marriage bond has become impossible. We may take these in an ascending scale of severity.

First comes the voluntary separation by agreement of the parties. The law looks with disfavour upon such an agreement; and any arrangement

[1] By many persons (of whom the good Vicar of Wakefield is a type) the view was held that even death did not dissolve the marriage tie, and that a person who married a second time, even after the death of the partner of the first marriage, was a "bigamist."

which contemplates a future separation is void. Thus, a clause in a marriage settlement stipulating for a division of property on separation would be inoperative; and a legacy or other gift to a man or woman, to take effect on his or her separation from his or her spouse, would not bind. But, if the parties to an existing marriage have made up their minds that they can no longer live together, the law allows them to enter into a deed, by which their intended or actual separation is regulated. Such matters as the allowance (if any) to be made by the husband to the wife, the custody and education of the children, the residence of either party, and the like, are proper matters for a separation deed; and the separation is usually made effective by the mutual covenant of husband and wife not to "molest" one another—*i. e.* not to force his or her company on the other, with a view to reunion or otherwise. All these are matters, *primâ facie*, for arrangement between the parties themselves, aided by such friends as they may call in to advise; but it must not be supposed that they can make any arrangements on such points as they like. More especially in connection with the children, the Court will be guided in its discretion as to the enforcement of any stipulation, by consideration for the children's welfare.[1] Again, no Court will enforce any stipulation which aims at promoting,

[1] As we have said before, a covenant in a separation deed by which a father agrees to give up the custody and control of his children to their mother is no longer void. But the Court will not enforce it, if it appears not to be for the benefit of the children to do so.

or even at tolerating, any irregular connection formed by either of the parties.

Though husband and wife can now contract directly with one another, it is still usual to have trustees for the wife as parties to a separation deed; and these trustees usually covenant to indemnify the husband from any liability for his wife's future debts. For, inasmuch as she is about to live apart from him with his consent, it is possible (though, if her allowance is duly paid, unlikely) that she might make him liable for her "necessaries," as explained in Chapter IV. Where the covenant of indemnity is given, the deed clearly becomes a "settlement for valuable consideration"; and, as such, enforceable, notwithstanding the husband's bankruptcy. Of course, in such an event, the wife can only claim a dividend along with his other creditors; but any property transferred by the husband to the trustees for the benefit of the wife will, probably, not be taken away from them, unless the Court thinks that the whole arrangement was intended as a fraud on creditors.

Apart from the terms of the deed itself, a voluntary separation has very few legal effects. The parties are, of course, still man and wife. So long as the separation continues on the basis of the deed, they cannot accuse one another of desertion; though, probably, a failure on the part of the husband to continue the allowance covenanted to be paid would subject him, not only to an action for the money, but to a claim for cohabitation, or,

failing that, to a charge of desertion. As we have seen, husband and wife have now no direct claims on the property coming to one another during the marriage; but it would appear that a mere voluntary separation does not deprive either party of any rights which he or she may have in the property of the other after that other's death, unless the deed so stipulates.

As a last point on voluntary separation, it may be noticed, and it is characteristic of the attitude of our law on the subject, that a voluntary resumption of the matrimonial life by the parties, for however short a time, puts an end to the deed.

The next step in the ascending scale of remedies has now become of comparatively little value, owing to the change in the law affecting married women's property. But the Divorce Act of 1857 provides for a "protection order" being granted by the Divorce Court, or by a Court of Petty Sessions, on the application of a woman who has been deserted by her husband without reasonable excuse, and who is supporting herself by her own industry or property. Whilst the order lasts, the wife is as if judicially separated, at any rate in respect of her property and contracts, and suing and being sued; and it is expressly provided that all her earnings, and her property, acquired subsequently to the grant of the order, shall be protected from her husband's creditors, as though she were an unmarried woman. Such an order should be regis-

tered, within ten days of being granted, with the registrar of the County Court in the district of which the wife lives.

A far more efficacious remedy was, however, provided by an Act of Parliament of the year 1895, which enables any Court of Petty Sessions, before which a husband is convicted of an aggravated or serious assault on his wife, or of desertion, or persistent cruelty, or of wilful neglect of her or her children, causing her to leave him, to make an order declaring that the wife is no longer bound to live with her husband; and this order may be accompanied by an order compelling the payment by the husband to the wife of a sum not exceeding two pounds a week, and giving her custody of the children under sixteen years of age. By a still more recent statute, the Licensing Act of 1902, a similar order as to separation and custody of the children may be made against either husband or wife, on the conviction of either as an habitual drunkard; but, in this case, even where the husband is the complainant, he will have to pay for his wife's maintenance. In either case, the order will have the effect of a decree of judicial separation, hereafter to be described.

The provisions of these last two statutes have been largely employed in the cases of the less wealthy members of the community, who cannot afford to resort to the Divorce Court, with its costly and lengthy proceedings. A very serious flaw in their machinery has, however, recently been

brought to light by the decision of the Court in Mrs. Harriman's case.

By that decision, a woman who has obtained a separation order, cannot, even where it was given for desertion, reckon the period during which her husband has lived under it apart from her, as a period of desertion for the purpose of claiming a higher remedy. In other words, a husband, against whom such an order has been made, can no longer be said to be "deserting" his wife; because his wife has applied to be relieved of his presence. Doubtless the decision is logical; for a person who wishes to live with another can hardly be said to desert that other, and this may be the wish of the party against whom the separation order was made. But probably some cautious amendment of the law will prevent a woman who has first availed herself of the more summary remedy being thereby deprived, in proper cases, of a resort to the higher.

An order made under either of the two statutes referred to will be cancelled if the parties voluntarily return to cohabitation, or if the wife is guilty of misconduct. And it may be mentioned that an allowance made to a wife under either of the Acts, is not alienable by her, and cannot be made available for payment of her debts.

Fourth in the ascending scale of steps towards the dissolution of a marriage, is the decree of judicial separation. This can only be obtained on petition to the Divorce Court; and it is, therefore, a somewhat costly proceeding. It is, however, open to

either husband or wife who accuses the other of adultery, cruelty, or desertion without cause for two years; and, in the case of the husband, it may be accompanied by a claim for damages against any man (technically known as a "co-respondent") whom he alleges to have committed adultery with the wife. On the hearing of the petition, the facts must be proved, usually to the satisfaction of a jury; for the proceedings are at least quasi-criminal, and any suspicion of collusion or arrangement between the parties is fatal to the claim. If it were not so, the Divorce Court would become simply an office for the registration of separations arranged by the parties.

The decree of judicial separation is, historically, the old decree of the Church Courts for divorce *a mensâ et thoro;* and the proceedings for it are regulated by the principles of the ecclesiastical tribunals. Consequently it may, in the discretion of the Court, be refused if the petitioner has, himself or herself, been guilty of any of the offences on the ground of which the petition can be brought, or if he or she has condoned the offences on the ground of which relief is sought.

The effect of the decree for judicial separation is not to dissolve the marriage; still less to enable the parties to marry again. It merely compels the guilty party to live separately from the other. Any attempt, by the guilty party, to insist on a return to cohabitation against the wish of the other party, is a contempt of Court; and will be punished as

such. Subject to the possibility of a successful appeal, the party who objects to the decree can only get rid of it by petitioning the Divorce Court to annul it, on the ground that it was made in his or her absence, or that the desertion alleged as the ground was not without reasonable excuse.

Though the effect of the decree of judicial separation is not to dissolve the marriage, it has a considerable effect on the legal relations of the parties. The Divorce Act of 1857 provided that, from its pronouncement, the wife should become as a single woman in respect of property, contracts, injuries, and earnings; and that, if she rejoined her husband, she should still keep as her separate property all property which she then had. These clauses are now of little importance, in view of the wider provisions of the Married Women's Property Act, before stated;[1] but the clause exempting a husband from all liability for his wife's acts during the separation is important, as well as the provision that if she dies before reconciliation has taken place, he shall have no claim on her property. It seems a little doubtful whether, in the converse case, a separated wife would have any claim on the property of her deceased husband, if he died intestate. We postpone for the moment all mention of the allowance (technically known as "alimony") which a husband may be ordered to pay his wife on a judicial separation, and of the position of the

[1] Chapter III, pp. 42–4.

children; except to say, that if alimony is ordered to be paid by the husband, and he fails to obey, the separated wife may pledge his credit for necessaries in manner described in Chapter IV.[1] A decree of judicial separation, like the minor remedies previously described, is no bar whatever to subsequent proceedings for a divorce; except, of course, that separation by decree cannot be reckoned as "desertion."

Fifthly, we come to the final step in the dissolution of the marriage bond, viz. divorce. This is, in England, as we have said, a comparatively new institution, at least in theory. For the Church Courts, holding the view that a once binding marriage could never be dissolved, in their decree of divorce only liberated the parties from cohabitation, not from the marriage tie (*a vinculo matrimonii*). In other words, the parties could not marry again during one another's lifetime. Before the Reformation, *de facto* marriages were often declared null from the beginning, on the ground of "pre-contract," as before explained;[2] and this fiction was often resorted to, though everybody knew that the intention really was to dissolve an existing marriage. But, as before mentioned, this particular ground of dissolution was abolished at the Reformation; and from that time until the year 1857, when the Divorce Court was established, the theory and practice of the Church Courts agreed. Valid marriages could only be dissolved by Act of Parlia-

[1] Pp. 52-3. [2] P. 3.

ment; a fact which rendered divorce the luxury of the wealthy.

Since the year 1857, it has been possible for an injured party to obtain a divorce in a regular though still costly fashion. In theory, the grounds on which divorce can be claimed are very different for husband and wife; in practice, as we shall see, the differences tend to disappear.

A husband is *primâ facie* entitled to a divorce on proof of his wife's adultery alone; a wife only on proof of aggravated adultery by her husband. The subject of aggravated adultery is not pleasant to discuss. Briefly, it means adultery accompanied by such aggravations as incest,[1] bigamy, unnatural crime, rape, cruelty to the wife, or desertion of the wife for two years without reasonable excuse. In this last connection, the decision in Mrs. Harriman's case is, as was before remarked, important and unfortunate; for it decides that if a woman has obtained a separation order under the Act of 1895, she cannot, on subsequent proof of her husband's adultery, treat him as having also deserted her, and so obtain a divorce.

But, though the scales are thus apparently very unevenly balanced, another important decision of the Courts has, in fact, made the positions much

[1] "Incest" usually means adultery with a person whom the offender could not marry if his or her wife or husband were dead. But the Deceased Wife's Sister Act still leaves the adultery of a husband with his wife's sister incest; though it removes the bar to marriage after the wife's death.

more nearly equal. For it was held, in a well-known case, that a wife was justified in her refusal to live with a husband who was guilty of *repeated* acts of adultery; it was decided that, in fact, she had not deserted him, but he had deserted her. It becomes, therefore, possible, by a somewhat ingenious twisting of words, for a wife, by refusing for two years to live with a husband who habitually commits adultery, to add to the adultery a charge of desertion for two years, and thus to entitle herself to a decree of divorce.

The word "entitle," however, is a dangerous one to use in this connection; for it must not be supposed that the English Divorce Court hands out divorce decrees with the facility attributed to some American tribunals. Not only must the alleged grounds of complaint be strictly proved; but recriminations may follow which will be fatal to the petitioner's claim. Thus, any well-founded suspicion of connivance in the commission of an offence, of forgiveness or "condonation" after the offence, or of collusion in the proceedings, will be a fatal bar to a claim for divorce. Nor is the discovery of such facts left to the parties themselves. For one of the most striking features of English divorce procedure is, that every decree passes through two stages, the one provisional, the other final. The former, known as the "decree *nisi*," is pronounced immediately after the trial; the latter, not till at least six months afterwards. During the interval, an official known as the King's Proctor

has a right to intervene with any evidence that he may have been able to discover; and if, on the application for an absolute decree, the Court considers the evidence to amount to proof of a fatal bar, it must rescind the decree *nisi*, instead of pronouncing a decree absolute. Another special precaution lies in the rule that all allegations of adultery must be precise and specific as to persons, places, and dates; while a husband must (unless specially excused), and the wife may, make the other party to the offence a party to the proceedings, when the latter may appear and rebut the charges. A husband may, as we have said, also claim damages from a man whom he alleges to have committed adultery with his wife. A wife has no corresponding right.

Moreover, in addition to the fatal or absolute bars to a petition for divorce, the Court may, in the exercise of its discretion, and usually does unless there are special excuses, refuse a decree of divorce to a petitioner who has, himself or herself, been guilty of a matrimonial offence. Thus, adultery by the petitioner, unreasonable delay in commencing proceedings, cruelty, desertion, wilful separation without reasonable excuse, or wilful neglect or misconduct conducing to the adultery of the other party, will be "discretionary bars," justifying the Court in refusing a decree; and these may be proved by the King's Proctor on the application for a decree absolute. It is, perhaps, in view of the importance of the point, permissible to state

again, that until the pronouncement of the "decree absolute," the parties are legally husband and wife, and cannot marry elsewhere. If they do, they are guilty of bigamy; even though they act with the best intentions. Strictly, it is not safe for them to marry until the expiration of three months from the pronouncing of the final decree; and only then if no appeal has been lodged.[1]

The three remaining remedies which can be sought from the Divorce Court are not steps towards a dissolution of marriage at all; but either an allegation that no legal marriage exists, or a request to enforce such a marriage. Still, for the sake of completeness, they should be mentioned here.

A decree of "nullity of marriage" is sought when the petitioner alleges that a marriage *primâ facie* valid and duly celebrated is not really a binding marriage at all; on the ground that the parties were within the prohibited degrees, or that one of them was, at the time of the alleged marriage, a party to a previously undissolved marriage, or that one of the parties was unaware that the ceremony in fact constituted a marriage, or that the respondent was physically incapable of consummating the marriage. Cases turning on the latter point are usually heard in private, or, as it is called, *in camerâ*.

[1] There is a still further appeal from the Court of Appeal to the House of Lords. Such an appeal must be lodged within one month from the pronouncing of the decree of the Court of Appeal. Appeals can be brought only on questions of law, not on questions of fact.

Here it is obvious that the decree, if pronounced, does not dissolve an existing marriage, but merely declares that the so-called marriage was in fact no marriage at all. Still, it is pronounced with just the same precautions against collusion as in the case of divorce; though, obviously, "discretionary bars" have no place in the proceedings—the marriage was void or it was not. But the two stages of "*nisi*" and "absolute" are observed; and the King's Proctor may intervene with a charge of collusion. For a decree of nullity may have one of the most unhappy of all consequences, viz. the bastardizing, or declaring illegitimate, of the children of the alleged marriage.

The fate of the children is always one of the gravest factors in a decree affecting marriage. It is, therefore, satisfactory to know that, even in suits for nullity of marriage, the Court has complete control as to their custody, maintenance, and education, both during and after the proceedings, until they attain sixteen. As a matter of practice, the custody is, almost always, finally given to the innocent party; though the guilty party may be allowed occasional access to them. And if the husband has been the guilty party, he will usually be ordered to make the wife an allowance for the maintenance of the children. Where both parties are guilty, or for other reasons unfit to have the care of children, the latter may be made wards of Court. If both parties are innocent, as when they went through the form of marriage in *bonâ fide*

ignorance of any impediment, probably the woman's claim, the children being illegitimate, would prevail; for, though a woman is not legal guardian of her illegitimate child, neither is its actual father. But, in such a case also, the man may be ordered to provide for the maintenance of the children.

In any case of a decree for judicial separation or divorce (and even, it would seem, for nullity of marriage) the Court may also order the husband to pay an allowance, or "alimony," for the benefit of his wife. As a rule, no alimony will be decreed in favour of a guilty wife, where a decree of divorce has been pronounced; though part of the damages obtained by the husband from an adulterer may be ordered to be settled for the maintenance of the wife, and, where no such resource is available, the Court may refuse the husband a divorce unless he will make some provision for the guilty wife. Where the decree is only for judicial separation, it is settled that the Court may award alimony to the wife; even though her misconduct has given rise to the proceedings. But the order usually ceases to operate if the wife remarries or leads an unchaste life; and that part of it which represents an allowance in respect of the children usually terminates on their attaining the age of sixteen, though it may be continued till they attain twenty-one.

With regard to the amount which will be allowed by the Court for alimony, that must depend a great

deal on the circumstances. A guilty wife is only given such an amount, by way of compassionate allowance, as will enable her to live in decency and comfort; regard being had to the station in life in which she was brought up, and to the husband's income. Where the husband is the guilty party, the general rule is, that he will be ordered to pay so much as, with the wife's own income, will make up one-third of their joint income. But this amount may be increased in special circumstances, *e.g.* where the wife has brought a large property into settlement; except that, on a decree for judicial separation, the Court is, apparently, limited to one-half of the joint income.

It seems that a decree for permanent alimony is not affected by the husband's bankruptcy—*i.e.* that the wife cannot, on the one hand, claim a dividend in the bankruptcy in respect of it, nor, on the other, can the husband claim that the bankruptcy releases his liability. In all probability, neither permanent alimony properly so called, nor the compassionate allowance made to a divorced wife, is capable of being alienated or seized by the recipient's creditors.

Besides this "permanent alimony," a wife who is either petitioner or respondent in a suit for judicial separation, divorce, or decree of nullity, is entitled, *primâ facie*, to alimony *pendente lite*, that is, an allowance for her support during the continuance of the proceedings; and the husband will usually be ordered to pay her such an amount as will give

her one-fifth of the joint income. But if the wife is living in open adultery, or has instituted vexatious proceedings, an order for alimony *pendente lite* may be refused, or granted at a much lower than the ordinary rate. A husband who regularly pays the alimony ordered ceases to be liable for his wife's necessaries; though up to the time that the order is made he remains liable for such necessaries, including the costs of the proceedings.

Another important power given to the Court is to take into consideration, in pronouncing a decree of divorce, judicial separation, or nullity, any settlement made on the marriage of the parties, and to vary its terms in accordance with the changed requirements of the situation. This provision is liberally interpreted by the Courts; and has been held to cover "dower" contributed by a Jewish wife or her relatives to the household stock, and lodged at a bank in the joint names of husband and wife. The variations are in the discretion of the judge; but, broadly speaking, a guilty party is not allowed to retain any benefits conferred on him or her by the innocent party in the settlement. Where both parties are innocent (as sometimes happens in cases of nullity), the principle is that, so far as possible, they shall be put in the position, with regard to property, that they occupied before the marriage. Where a marriage is dissolved by reason of a wife's adultery, the Court has further power to order a settlement of any property to which she may be

entitled, for the benefit of the innocent party, and the children of the marriage, or any or either of them.

In conclusion, allusion must be made to two other legal remedies in connection with marriage or alleged marriage. It is a legal wrong, and, obviously, may be a grave scandal, for one person to allege, untruly, that he or she is married to another. To stop such allegations, a decree of "jactitation of marriage" may be obtained, formally denying the existence of the alleged marriage, and enjoining silence on the claimant; and if, after such a decree, the offence is continued, the offender is liable to be punished for contempt of Court. It may be mentioned, however, that for a divorced wife, especially if innocent, to continue to use her husband's name, is not unlawful, and does not amount to a claim of marriage.

A decree for "restitution of conjugal rights" can, as was said in Chapter III,[1] be obtained by either party to a valid marriage, if the other party unlawfully withdraws from cohabitation. But, inasmuch as the Court cannot now, on failure to obey such a decree, punish the disobedient party with imprisonment, this remedy is almost worthless, except as formal proof in a subsequent claim founded on desertion. For if a person, ordered to return to cohabitation, refuses to do so, that is at least *primâ facie* proof of desertion on his or her part. Indirectly, however, the decree is of value;

[1] P. 36.

inasmuch as, if it is disobeyed, the Court may order a periodical allowance to be made by the disobedient husband to the wife, or, where the wife has disobeyed a similar order, may order any part of her property or income to be settled in such a way as to provide a periodical payment for the benefit of the husband or children, or both.

CHAPTER VII

INTERNATIONAL MARRIAGES AND FOREIGN DIVORCE

It is almost impossible to find a short and comprehensive title for the subject of this chapter. It proposes to treat of the validity and consequences, according to English law, (*a*) of marriages between persons of whom one, at least, is subject to some other marriage law, (*b*) of divorce, nullity, and separation pronounced by tribunals which are not English. The term "international" is, admittedly, not completely suitable to describe marriages of this kind; for, as we shall shortly see, the validity of a marriage does not, according to English law, depend upon the *nationality*, but chiefly on the *domicile* of the parties. But the expression "foreign marriages" has, as we have already seen, been officially appropriated to marriages which, though they happen to be celebrated abroad, are, to all other intents, English marriages; and the expression "mixed marriages" seems to have been somewhat arbitrarily applied to marriages between parties professing different religious faiths—a matter with which English law is only very indirectly concerned. Unless, therefore, we are to invent for our purpose some barbarous term such

as "extra-domiciliary," we must perforce fall back upon the term "international." On the other hand, the expression "foreign divorce" seems to have been used only in its proper sense, viz. as descriptive of a divorce pronounced by a tribunal not administering English law.

The sort of problem we are about to explore, then, is this: A French merchant, habitually living in Paris, when on a visit to England becomes acquainted with an English lady, and ultimately marries her in England. She returns to France with him. They subsequently settle in America; and, whilst in America, are divorced by an American Court. By what standard will an English tribunal, if called upon to decide, judge (*a*) of the validity of the marriage, (*b*) of the rights and liabilities conferred by the marriage, (*c*) of the validity of the divorce? The problem may be complicated to almost any extent by the introduction of new circumstances; but this is an average problem of the kind we are now studying.

Before commencing our list, however, it is worth while to repeat a caution which has before been given in this book. Unhappily, there is no true international law on the subject of marriage. Therefore, it is by no means certain (in fact it is highly improbable) that the rules laid down by the English Courts on any point of this difficult subject will be the same as those adopted by the tribunals of all other countries. Thus, to refer to the example given above, it might well be that an

English Court would pronounce the marriage valid, while a French Court would treat it as void. And the same holds true of the divorce; a French tribunal might hold it ineffectual, whether it had treated the marriage as void or not, while an English Court might hold both to be valid. Whence it results, that two persons may well be considered as married in one country, as entirely unrelated in a second, and as divorced in a third. On the inconveniences of such a state of things, it is unnecessary to dwell. Unfortunately, there seems to be small chance of putting an end to it. But it is time that we realized the views of English law on the subject.

With regard to these, the first and, perhaps, most important point to remember is: that, according to English law, most of the questions which arise out of the problem we are now considering are decided by the law of the *domicile* of the parties. In questions affecting the validity and consequences of the marriage, the important point is the domicile of the parties at the time of the marriage; sometimes, but most unhappily, called the "matrimonial domicile."[1] In questions affecting the validity of a divorce, it is the domicile of the parties at the time of the commencement of the divorce proceedings. It is necessary, therefore, to explain, very briefly, the meaning of this important notion of "domicile,"

[1] *e. g.* by Professor Dicey, in his most valuable book, *The Conflict of Laws*. But surely by the term "matrimonial domicile" the average person understands the place where the matrimonial establishment is, for the time being, fixed.

and, especially, to distinguish it from another idea, with which it is frequently confused, viz. the idea of "citizenship" or "nationality."

As the word implies, a person's domicile is the place in which he makes his *home*. But this is only to shift the difficulty from one word to another. What is the legal meaning of the word "home," about which so many and so deep-seated feelings cling?

This question, though extraordinarily difficult to answer exhaustively, may, perhaps, be best attacked by remembering the suggestion of the witty but physically somewhat infirm judge, who hinted that the judicial bench might fairly be described as his home; because he ate, drank, and slept there. In other words, a person's "home" is where he habitually performs the essential functions of physical life.

But, however well that definition may have accorded with the simplicity and fixity of primitive conditions, it requires more than one substantial qualification in view of the facts of modern civilization. For example, a vast number of business men spend the working hours of the day in one place, the hours of leisure and recreation in another. Of course, in most cases, this fact is immaterial for our purpose; both places being within the same jurisdiction. But suppose a merchant born in Scotland of Scottish parents, to visit his office in Carlisle every day; returning to sleep at his house in his native town of Galashiels. Here,

although the greater part of the twenty-four hours were spent, and, perhaps, the majority of his meals eaten, in England, there can be no doubt that the domicile of the merchant would be Scotch.

A much more difficult case occurs where the son of an English merchant opens a branch of his father's firm, say, in Melbourne. Obviously, he performs all the essential functions of physical life, it may be for many years together, in Victoria; he works, eats, drinks, sleeps, it may be marries, there. Is he, therefore, domiciled in Victoria? Probably not, until he has given up all present intention of returning to England. If he is merely waiting for a vacancy in the English office, then, however uncertain the date of his return, he will not be deemed to have lost his original domicile. For, in all points of unwritten law (and the law of domicile depends almost entirely on tradition) the old rule only yields with great difficulty to the influence of modern conditions. On the other hand, a man who went out from England to take up a professorship in an Australian university, would probably be held, in the absence of counter evidence, to have acquired a domicile in the colony in which his university was locally situated. In other words, a man's domicile is where he *resides*, with the intention of residing *permanently*.

This is the fundamental notion of domicile; but the reader must be cautioned that there are special applications of it by our law which are apt to prove traps for the unwary. Thus, for example, a person

under full age cannot himself acquire a domicile; though he must have one. His domicile is that of his father, if his father is living; that of his mother, if his father be dead. If both parents are dead, the minor's domicile is that which his last surviving parent had on his or her death. And it would seem that the marriage of a male minor would not affect the rule.[1] But in the case of a married female minor, inasmuch as a married woman (even though in fact living apart from her husband) is deemed to have her husband's domicile, the general rule on the subject of the domicile of minors would not apply. Finally, though we cannot enumerate all the difficult rules on the subject, it should be remembered that there is always (except, perhaps, in the case of married women) a presumption in favour of the domicile acquired at birth, or, as it is called, the "domicile of origin." Thus, if a man, born in England of English parents, emigrates to America with the intention of settling there, he would, if of full age, be held to have acquired a domicile in that American State in which he actually settled. But if he afterwards definitely abandoned his American projects, and drifted to Australia, where he died without having formed any definite plans, he would probably be held, by English law, to have died domiciled in England.

[1] It will thus be seen that, in such a case, the wife, even though of full age, may acquire the domicile of her father-in-law, and be compelled to keep it till her husband attains his majority.

Before passing, however, to the attitude of our law on the subject of international marriages, we may pause to draw attention once more to an important point which has indirectly appeared during our recent discussion. Domicile has nothing directly to do with citizenship, or political allegiance. Two consequences follow from this principle. One is, that a man may, for example, be a French citizen with an English domicile. Such instances are common. For domicile is a matter of private law; while citizenship is a matter of public law. And the two laws need not clash; though, if they do so, private law must give way. The other consequence is, that there may be many domiciles within one State; as is, in fact, the case of the British Empire, within which at least a score of different systems of private law hold sway over different localities. Thus we speak of "English domicile," not "British domicile"; and thus, so far as marriage law is concerned, Scotland, to say nothing of the colonies, is almost as much a foreign country as is Japan. It is essential, in approaching our present subject, to bear these facts in mind.

I

English law judges of the validity of a marriage chiefly (but not entirely) by the law of the domicile of the parties at the time when the marriage was effected. A woman domiciled in England marries,

in France, a man domiciled in France. If by French law the man is capable of marrying the woman, and if by English law the woman is capable of marrying the man, all English Courts regard the marriage as *primâ facie* valid. If by the law of the domicile of *either*, that person was incapable of contracting valid marriage with the other, then the English Courts will pronounce the marriage void; whatever the ordinary English law on the point. Needless to say, this rule often causes great hardship; and there has been in recent years a disposition on the part of English judges to resent it. Thus it has been suggested that where a legal incapacity imposed by a foreign law is of a kind which the English Courts consider to be repugnant to the feelings of civilized nations, *e.g.* an incapacity founded on colour or caste, then, if the marriage was celebrated in England, it will be held, at any rate where the party seeking to enforce it was domiciled in England at the time of the marriage, to be valid in English Courts. This was the exception on which the recent and well-known decision in the Chetti case was based; and there is, on the part of some lawyers, a disposition to hold that whenever the marriage is celebrated in England, and one of the parties is domiciled there, the capacity of the parties is governed entirely by English law. In the writer's view, this tendency is premature. The decision in the Chetti case is so remarkable, that it must be treated with the greatest caution. The orthodox view still is, that,

with limited exceptions, the domicile of the parties governs their capacity to marry.

But, to ensure complete recognition, the party asserting the marriage must go on to show that, in the celebration of the marriage, the forms of the country where the celebration took place were complied with. And so, even though, both by French and English law, the parties were capable of marrying one another, yet, if, in the case first put, the French requirements of form (*e. g.* registration at a *mairie* or town hall) were not complied with, the marriage will be void in the English Courts.

This latter principle, that form depends on the law of the locality, is doubtless derived from the days when religious controversies were acute, and when, to have attempted to depart from local rule in the celebration of a marriage service, might easily have provoked bloodshed. But, wise as it was at one time, the principle now leads to curious results. Thus, in the case put, if the parties were married in France according to English forms, the English Courts would be bound to pronounce the marriage void. And yet, if the same parties had been married in England in precisely the same way, the marriage would have been binding according to English law.[1]

An even more curious result is possible. Eng-

[1] It will be remembered, however, that, by the recent Foreign Marriages Act, 1892, the marriage of a British subject abroad, before a duly authorized "marriage officer," will be deemed valid, in any British Court, in respect of formalities (*ante*, p. 32).

lish law regards consent by third parties to a marriage as a question of form. We have already seen (p. 19) that English law itself requires such consent, in the case of marriage of minors. Other laws, *e.g.* the French, are still more strict. And yet, in the case put, if, by French law, the man, though capable of marrying the woman, ought to have obtained the consent of his parents before doing so, English law will, if the marriage took place in France, regard the omission of such consent as a fatal impediment. If, however, the marriage had taken place in England, the absence of the same consent would not have prevented the English Courts pronouncing the marriage lawful. It does not at all follow, however, that the French Courts would take the same view; and so, in that case, the parties, though deemed married in England, would not be deemed married in France. In this particular instance, English law seems to be entirely to blame for the unfortunate results. And it was, as we have already noticed, the same mistaken principle which gave force in England to the "Gretna Green" marriages of English minors.

Finally, on this point of the validity of international marriages, it may be observed that English law raises no objection to the fact that a domicile was purposely acquired for the purpose of obtaining marriage capacity. Thus, a woman of full age, domiciled in England, who desires to marry her uncle, domiciled in a German State in

which such marriages are allowed, may *before* her marriage, acquire a domicile in that State, and thus become capable, by English law, of contracting the marriage. But it will, of course, be a question in the case whether she did, in fact, settle in the German State before the marriage, with the *bonâ fide* intention of making it her home.

II

With regard to the rights and liabilities arising out of what we have called an "international marriage," the matter is not quite so simple; though here again domicile is, on the whole, the most important factor.

Thus, the respective rights of husband and wife in one another's property are determined by the domicile of the parties at the time of the marriage; though, in this case, English law solves what might appear to be an insoluble difficulty by holding that the wife acquires the husband's domicile not merely after, but at the very moment of, the marriage. Thus, if a lady domiciled in England marries a man domiciled in France, then, whether the marriage took place in England or in France, the mutual rights of the parties in one another's property, whether land or chattels, and whether acquired before or after the marriage, will be governed by the law of France. This may or may not be a good thing for the lady, according to the circumstances;

but, evidently, it is a matter of first-rate importance for her to know, that even the Courts of her own country will consider her as submitting to French law on the point.

No doubt the position may be, and frequently is, modified by a marriage contract or settlement executed by the parties; and such contracts are more common in Continental Europe than in England. Still, even in such a case, the fact of domicile is important; for by English law, such a contract is interpreted according to the law in force in the country of the husband's domicile at the time of the marriage. Thus it may be impossible for certain stipulations in the contract to be enforced; because they are forbidden, or not recognized, by the law of the husband's domicile.[1]

A somewhat fine point arises in connection with the rights of the parties to succeed to each other's property on death. If such right is a true right of survivorship conferred by the marriage, then it depends on the conditions just stated, and is governed by the law of the husband's domicile at the time of the marriage. There are many such rights recognized, for example, by French law. But if the right is merely derived from the law of bequest or inheritance, then it will be governed by the law

[1] A striking example of this truth is the important "restraint on anticipation" of the wife's income, so often appearing in English marriage settlements. Such a provision is probably void by the law of most Continental countries; and, if so, it would be useless to insert it in a settlement governed by foreign law.

of the husband's domicile when the succession took place, which may, of course, be very different from his domicile at the date of the marriage. Thus, for example, a right to dower out of the husband's land is conferred on a wife by English law at the time of marriage; though, as we have pointed out (pp. 44–5), it may now be defeated in many ways. On the other hand, a widow's right to a share in the personal property of her deceased husband is a mere right of succession. Accordingly, if husband and wife are both domiciled in England at the time of the marriage, but subsequently become domiciled in Scotland, and the husband dies, the widow's claim to dower will, in the English Courts, be governed by English law; but her claim to a share of personalty will be governed by Scotch law. The principle is, that a subsequent change of domicile cannot affect rights which were expressly guaranteed, either by law or by contract, at the time of the marriage; while there is no implied promise on the part of any country that it will not, from time to time, alter its laws of succession. The difference was forcibly illustrated, a few years ago, on the death of the proprietor of the well-known Café Royal in Regent Street, who, coming to England with small savings, became not only domiciled but naturalized in England, and amassed a large fortune there. He left a will disposing of all his property; but this was set aside in favour of his widow, to whom he had been married whilst domiciled in France, the law of which country gave

her, on the marriage, a half share in all her husband's property present and future.

It is probable, however, that this principle of domicile does not apply to rights claimed by a father in the property of his infant children. By the law of certain countries, he is entitled to the income of this property; but it is very doubtful if the English Courts will enforce such a claim, unless the father and the children are both resident in the country which makes the provision. Thus, if a domiciled Frenchman, to whose infant children had been left property locally situated in England, applied to the English Courts for payment of the income, it is quite probable that the Courts would assent to his claim, so long as both he and his children were resident in France. But, if he brought them to England, his claim would probably be defeated, on the ground that it was inconsistent with English arrangements on the subject. It will be noticed that this practice is not really at variance with the general rule; inasmuch as there could be no implied consent by the children at the time of the marriage to submit to the law of their father's domicile.

With regard to the mutual liability of husband and wife to satisfy obligations incurred by the other, "international marriages" have little to do. Broadly speaking, liability to satisfy an ordinary obligation is governed by the law of the country where that obligation was incurred; except that no contract directly relating to land will be en-

forced, unless it is in accordance with the law of the country in which the land is situated. Such obligations, then, with the important exception just noted, will, if incurred in England, be enforceable against husband or wife according to the rules laid down in Chapter IV. If they are incurred abroad they will be enforced according to the law of the country where they were incurred. It thus seems probable that if, for example, the husband incurred a debt in a country by the law of which his wife was liable to make good such debt, the English Courts would be bound to enforce it against her in this country. This case has, however, it is believed, not yet arisen; though it would seem highly probable that the converse case, in which a wife has incurred debts in a foreign country which her husband has subsequently been called upon to pay in England, has often occurred. In such an event it would seem not to be open to the husband to plead that, by English law, he was not liable (generally speaking) for his wife's debts. But there appears to be little, if any, authority on the subject; and it must be noted that where the obligation sought to be enforced was not what is ordinarily understood as a "debt," but arose from some wrongful act, such as misappropriation or trespass, it cannot be sued upon at all in an English Court, unless such an act is also a wrong or "tort" by English law, and not even then if it consists of an injury to foreign land.

But the principle of domicile is also of weight

in the important matter of the legitimacy of the children of a marriage. Children born during the marriage of their parents, or within the normal period after their father's death, will probably be regarded as legitimate everywhere; certainly by the English Courts. But the law of England is somewhat singular in refusing to recognize the effect of a subsequent marriage between persons to whom a child has been born. According to the law of the Catholic Church, and of most civilized European countries, subsequent marriage by the parents of an illegitimate child, and formal recognition of the child's paternity by the husband, are, at least in certain cases, sufficient to make the child legitimate. How far does English law, in dealing with the children of "international" and wholly foreign marriages, recognize this rule?

It must be confessed that its attitude, if characteristic, is neither logical nor convenient. So far as personal property (including, probably, leasehold interests) is concerned, an English Court will treat as legitimate for all purposes a child who has been legitimated by the subsequent marriage of his parents; provided that such legitimation is recognized by the laws of the countries in which the father was domiciled both at the time of the child's birth and at the time of the subsequent marriage. Thus, if a man and woman, unmarried, live together in Holland, where the man is domiciled, and have a child, and subsequently settle in Geneva and are there married, and the husband formally

recognizes the child as his, the child will be able to succeed to all the personal property of its father which may happen to be in England at the father's death; because (it is believed) both the law of Holland and the law of Geneva recognize legitimation by subsequent marriage. But if the move had been to England itself, and the marriage had taken place there, or if the child had been born when its father was domiciled in England, and the subsequent marriage celebrated after he had acquired a domicile in Holland, the decision would have been different.

And the recognition of the English Courts in such cases never extends to the inheritance of "real estate," *i. e.* of freehold or copyhold lands. A legitimated child can take such lands by will or devise; if he is described with sufficient accuracy in the will. But, if the father dies intestate as to the land, the child cannot inherit, or take as "heir"; for, by a famous decision of the Courts, delivered in 1835, the law of England, which, as we have seen, governs all questions relating to the succession to immovables in England, requires that an *heir* should not only be legitimate, but that he should be born in lawful wedlock. By similar reasoning, a father could not inherit real estate in England from or through his legitimated child.

But it is when we come to the question of the rights over the person of wife and children conferred by an "international" marriage, that the importance of domicile really diminishes. There

appears to be but little express authority on the subject; but the opinions of text-book writers of repute, combined with a general consideration of the attitude of English Courts towards such questions, would seem to render it highly improbable that English Courts would, in such cases, apply any rules but those of English law itself. For such questions are really questions of police or criminal law; and criminal law is a part of public, not of private, law, because the State is concerned in it not only as judge but as prosecutor. Suppose, for example, that the law of Spain or Italy allowed a husband, under certain circumstances, to imprison or administer physical chastisement to his wife; and suppose a man domiciled and married in Italy or Spain to come to England with his wife for a longer or shorter time. Is it conceivable that the English Courts would enforce such rights, or even that they would refuse to punish the husband for exercising them? A similar treatment would, in all probability, be accorded to the claims of a father to exercise control over the persons of his children; and there is express authority for saying that a guardian appointed by a foreign Court, or by a parent under the authority of a foreign law, will not be treated strictly as a guardian by the English Courts, though these will, naturally in the exercise of their discretion, attach great weight to the foreign rules, if the parties would have been amenable to them by the law of their domicile. It is obvious that such questions

can hardly arise unless the parties are actually resident in England; for the criminal jurisdiction of the English Courts cannot be exercised over persons not resident in England, though, if the offence charged is committed in England and the person charged subsequently escapes, steps may sometimes be taken, by the process known as "extradition," to get him handed over to the English Courts by the authorities of the country where he may happen to be.

III

In conclusion, we have to consider briefly the effect which will be given by the English Courts to a foreign divorce or analogous decree; and in what circumstances English Courts will entertain proceedings undertaken for the purpose of procuring such decrees.

Here again, as was stated at the beginning of this chapter, the English Courts, at any rate where the actual dissolution of a marriage is concerned, rely chiefly upon the domicile of the parties. But, in this case, it is not the domicile of the parties at the time of the marriage, but at the commencement of the proceedings, that is material. And as, by English law, the domicile of the husband is also the domicile of the wife, the practical inquiry is as to the domicile of the husband. According to

English law, then, a decree of divorce pronounced by a competent Court of the country in which the husband was domiciled when the proceedings were commenced, is *primâ facie* valid for all purposes; and, conversely, no decree of any other Court is effectual. As a logical consequence of this view, an English Court of competent jurisdiction will entertain a petition for divorce when, and only when, the husband is domiciled in England. It is immaterial, in both cases, whether the petition is presented by the husband or the wife, where the marriage took place, what the nationality of the parties, or where the alleged offence, on which the petition is based, was committed.

But from this extremely simple rule there are three important exceptions.

The first is where an English Court is asked to recognize the validity of a divorce pronounced by a Court which is not that of the husband's domicile, but which the law of the husband's domicile recognizes to be competent to dissolve his marriage. The case occurred a few years ago. An English lady married, in England, an American citizen domiciled in New York. She subsequently divorced him in South Dakota, where she had only resided for three months without any intention of settling there, and where he had never resided at all. By New York law (the law of the husband's domicile) such a divorce is considered valid. The English Court therefore regarded it as valid also.

In the second place, a man who, being domiciled

in this country, deserts his wife and deliberately acquires a foreign domicile in order to entitle himself to a divorce by the law of that domicile, does not deprive his wife of the right to petition for a divorce in England. It may be (though this is less certain) that the English Courts will refuse to recognize a divorce obtained by him in his new country; on the ground that his wife is still domiciled in England. It will be noticed that similar conduct on the part of the wife cannot affect the husband's rights in this respect; inasmuch as a wife cannot, in any circumstances, change her husband's domicile.

The third exception from the general rule that domicile, and domicile only, is a ground for divorce jurisdiction, occurs when a divorce is pronounced by the Court of a British dependency acting under the express authority of an enactment of the legislature of that dependency. Inasmuch as these enactments have all received the sanction of the Crown, it seems a little difficult, though not impossible, for the English Courts to refuse to regard them as binding for all purposes; even when they authorize the entertainment of divorce proceedings by parties who are merely resident, and not domiciled, within the jurisdiction of their Courts. Probably, it is a question of the wording of the statute in each case; though again it may be doubted, as a matter of public law, whether a merely local statute can be directly binding on Courts outside its locality. And, in any case, it may safely be said,

that no colonial or Indian statute authorizes divorce proceedings by mere transient visitors.

Next arises the question: *what law* will guide the English Court, where it exercises its jurisdiction, in deciding whether or not to grant a divorce. At one time, the English Courts inclined to the view that the law of the husband's domicile at the time when the marriage was entered into, governed the case. It will readily be seen how important this view was. Suppose, for example, a man and woman, domiciled in Italy, where divorce is not recognized, to marry. They subsequently come to England, and are domiciled here. Differences arise; and the wife seeks a divorce. According to the old view her petition must fail, however great her sufferings. On the other hand, in the converse case, of a couple married in England and subsequently domiciled in Italy, the English Courts would have assumed that an Italian Court was bound to grant a divorce. The result was that this view, though not without some appearance of justice, required the Courts of a country in which divorce was not recognized to grant divorces in exceptional cases,[1] and required the Courts of a country where divorce was fully recognized, to refuse it in exceptional cases.

There was great practical difficulty in acting upon such a view; and the principle now adopted by the English Courts is: that the tribunal entitled to entertain a suit for divorce on the ground of the

[1] The great practical objection to such a principle was, that in such a country there would be no divorce tribunal.

domicile of the parties, ought to decide upon the petition in accordance with its own laws. In other words, the English Courts, in deciding on a petition for divorce presented in England, will dispose of it according to English law, wherever the parties were domiciled at the time of the marriage.[1]

But, though the English Courts thus frankly admit that a *bonâ fide* change of domicile by the husband may give both him and his wife rights, or impose upon them liabilities, in respect to divorce, which are not sanctioned by the law which, for most purposes, governs their marital relationship, yet the English Courts are very far from recognizing what may be called "divorce while you wait." Rightly or wrongly, the practice, if not the law, of some American States is believed in this country to afford exceptional facilities for rapid dissolution of the marriage tie: but such facilities are not recognized by the English Courts. It must again be borne in mind, that mere residence in a country does not, in the English view, constitute domicile —that domicile, as was explained at the beginning of this chapter, consists of, or is produced by, a combination of the two factors, residence and intention to remain permanently resident. And so the petitioner who takes a room at a Dakota hotel, and obtains a divorce in the intervals of a holiday tour, is not on that account regarded by the English Courts as divorced from his or her wife or husband;

[1] For the grounds of divorce recognized by English law, see p. 83.

save in the exceptional circumstances in which he happened to be domiciled in a country whose law recognized such divorces.

It is, however, when we come to matrimonial decrees which do not profess to dissolve valid marriages, but to afford some minor remedies, that the principle of domicile is most definitely abandoned as a crucial test. Thus, if a petitioner seeks a declaration that an apparently valid marriage was really no marriage at all, or merely asks for judicial separation, or, on the other hand, for a restitution of conjugal rights, it is sufficient to give the English Courts jurisdiction that the parties are *bonâ fide* resident in England, *i. e.* that they are not merely travelling through the country, or making a formal stay for the purpose of the proceedings. Where the relief sought is a declaration of nullity, it seems to be even sufficient that the marriage was celebrated in England, without the residence of the respondent or opposing party; and this would, doubtless, have been the proper remedy for Mrs. Ogden, in the case previously alluded to, but for the unfortunate fact that, in her case, the English Courts regarded her first marriage as binding, though the French Courts treated it as invalid. And there can be no reasonable doubt that the valuable but minor remedies known as "protection" and "separation" orders, previously described (pp. 77–9), are available where the parties are merely resident, and not domiciled, in England. These are not remedies which directly affect the

permanent legal relationships of the parties; however valuable the relief afforded by them.

Finally, it may be pointed out, that the hearing of any proceedings for relief from marriage ties involves a preliminary inquiry as to the validity of the marriage which it is sought to relax. It would be absurd and mischievous to pronounce a divorce between persons who were not, in the view of the Court, lawfully married at all; still more mischievous to order two persons, not really man and wife, to live together. In all cases then, of matrimonial proceedings, an English Court will require strict proof of the existence of a marriage which is, at least *primâ facie,* valid, according to its own rules. And this will, in effect, involve an inquiry on the lines laid down in the first part of this chapter.

From this obvious truth follows one very curious result, illustrated by the well-known case of Mrs. Ogden, so often previously referred to. If the English Court resolves that the marriage in question was valid, it clearly cannot, without stultifying itself, admit that the decree of a foreign tribunal which pronounced it null and void, is binding. To do so would, in effect, be, to hold the same marriage both valid and void; and, little as English law loves logic, it cannot go quite so far as that. Obviously, then, a foreign decree of nullity stands on a different footing from a foreign decree of divorce; even though the parties were domiciled in the jurisdiction of the foreign Court when the

proceedings for the decree of nullity were commenced. In what precise circumstances a foreign decree of nullity will be regarded as conclusive by our Courts it is at present almost impossible to say. And there seems to be similar doubt as to the effect of a foreign decree of judicial separation, where such a decree is issued. But these are only illustrations of the difficulties of a very difficult subject.

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* The author feels compelled to acknowledge his special obligations to this work, which is accepted as an authority in itself. It is an exhaustive statement of the law on a very difficult subject.

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